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In The
Supreme Court of the United States

OCTOBER TERM, 1954

No. 274

PHILLIPS PETROLEUM COMPANY,
a corporation,
Petitioner,

VERSUS

CABOT CARBON COMPANY,
a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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In The
Supreme Court of the United States

OCTOBER TERM, 1954

No.

PHILLIPS PETROLEUM COMPANY,
a corporation,

Petitioner,

VERSUS

CABOT CARBON COMPANY,
a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Phillips Petroleum Company ("Phillips") prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Tenth Circuit affirming a judgment of the United States District Court for the Western District of Oklahoma in favor of the respondent, Cabot Carbon Company ("Cabot"), against Phillips for $387,282.37, arising out of orders of the

Oklahoma Corporation Commission prescribing a minimum price for gas produced in the Guymon-Hugoton Field.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 124), written by Judge Huxman, concurred in by Judge Murrah, with Judge Pickett dissenting (R. 130), is reported in 210 F. 2d 841.

The opinion of the District Court for the Western District of Oklahoma (R. 13) is reported in 114 F. Supp. 953.

JURISDICTION

The judgment of the Court of Appeals was entered February 12, 1954 (R. 134). An order was entered March 4, 1954 (R. 134) extending to and including March 24, 1954, the time for filing a petition for rehearing. Petition for rehearing (R. 139) and application for hearing thereof *en banc* (R. 135) were filed March 24, 1954 and denied April 12, 1954 (R. 175).

By an order signed by Justice Tom C. Clark entered and filed by the Clerk of this Court on July 9, 1954, the time within which petitioner may file its petition for a writ of certiorari was extended to and including August 11, 1954.

Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

The Corporation Commission of Oklahoma entered an order effective January 1, 1947, which provided that "no natural gas shall be taken out of the producing structures or formations in the Guymon-Hugoton Field in Texas County, Oklahoma, at a price, at the wellhead, of less than 7c per thousand cubic feet of natural gas." Effective August 1, 1952, the minimum price was increased to 9.8262c per thousand cubic feet.

In 1944 Cabot assigned to Phillips certain oil and gas leases on lands in the Hugoton gas field, in consideration of $530,673.50 cash, and an overriding royalty of 4c per thousand cubic feet of ¼ of ⅞ of all the gas produced. By these assignments Cabot transferred to Phillips all its interest in the leases which included all rights to drill for, produce and dispose of the gas.

The judgment of $387,282.37 represents the difference with interest for the period January 1, 1947, to November 1, 1952, between the amount of the overriding royalty as provided by the contract and an amount computed by substituting the minimum prices of 7c and 9.8262c, respectively, for the 4c specified in the contract.[1]

On July 16, 1954, the Corporation Commission of Oklahoma, after due notice and hearing, entered an order construing and applying its minimum price orders to the

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[1] The judgment also provides that Cabot recover from Phillips "such additional sums, together with interest at 6% thereon, as have accrued for gas sold by Cabot to Phillips at 9.8262c per thousand cubic feet from November 1, 1952 to this date" (R. 20).

factual situation here involved, and decreed that no producer shall be required by reason of said orders to pay to the owners of any royalty, overriding royalty or other interest in the gas any sum in excess of that required to be paid by the terms of the contracts.

The questions presented are:

1. In view of the decision and order of the Corporation Commission construing and applying its minimum price orders to the factual situation here involved in a manner directly opposed to the decision of the Court of Appeals, should this Court recognize the state law and policy to be as declared by the Corporation Commission, the agency which made the orders, and reverse the judgment of the Court of Appeals or remand the case to that court for further consideration.

2. Whether said minimum price orders, as construed and applied by the Court of Appeals, contravene the contract impairment (Section 10 of Article 1) and the due process clause (Section 1 of the Fourteenth Amendment) of the Constitution of the United States.

3. Whether the Court of Appeals should have avoided the serious constitutional question here presented (1) by staying further proceedings pending interpretation and application by the state tribunals of the minimum price orders to a factual situation comparable to the one here involved, and pending final decision of the constitutional validity of the second order; or (2) by construing said orders as not applying to fixed price overriding royalties.

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4. Whether the Court of Appeals correctly interpreted and applied the minimum price orders to the fixed price overriding royalty so as to nullify the contractual provision of the parties and increase the costs of the producer, and whether the Court of Appeals, in interpreting the minimum price orders, violated settled state law in respect to the ownership of oil and gas in place.

STATUTES INVOLVED

Involved are Orders Nos. 19514 (R. 60-67), 19702 (R. 84-87), 26096 (R. 96-101) and 28884 of the Corporation Commission of Oklahoma and Sections 239, 112 and 241, Title 52, O. S. 1951, under which said orders were made. Order No. 28884 is printed as Appendix A and the Statutes as Appendix B.

STATEMENT OF THE CASE

This action was brought by Cabot against Phillips in the United States District Court for the Western District of Oklahoma. Jurisdiction was based solely upon diversity of citizenship (R. 3). The action involves the interpretation and application of orders of the Corporation Commission of Oklahoma (Commission) fixing the minimum price of gas in the Guymon-Hugoton Field in Texas County, Oklahoma, as applied to the agreed rate of overriding royalty payments by Phillips to Cabot under a contract whereby Phillips, a producer, acquired gas leases in the Hugoton field from Cabot. The judgment for $387,282.37 (R. 20, 134) represents the dif-

ference between the amount called for and paid by Phillips under the contract and the amount payable if the orders control for the period January 1, 1947 to November 1, 1952, with interest to July 13, 1953 (R. 20).[2]

Contract Rights of Parties

By written contract dated March 10, 1944 (R. 31), Cabot, in part as lessor and in part as assignor, agreed to execute and assign to Phillips gas leases covering approximately 43,500 acres of land, 39,000 acres being located in the Guymon-Hugoton Gas Field. Phillips, under the contract, leases and assignments[3] became the lessee with the exclusive right to develop and operate the leases and to produce and dispose of all of the gas. As consideration, in addition to the payment by Phillips of a cash bonus of $530,673.50 (R. 32) and the usual and typical lessor's royalty of 1/8 of the market value or proceeds of sale of the gas produced with respect to those lands in which Cabot held fee title to the gas rights (Paragraph 3, R. 47), the contract (Paragraph 4, R. 32), leases (Paragraph 12, R. 50), and assignments (R. 44) reserved to Cabot an overriding royalty payable by Phil-

[2] On the basis of the Commission order presently in effect it is estimated that over the productive life of the leases the principal amount payable will exceed by $3,000,000 the amount payable under the contract, if the Court of Appeals' interpretation is sustained.

[3] It is stipulated (R. 22 and 23) that Plaintiff's Exhibits 2 (R. 43), 4 (R. 46), 7 (R. 56) and 8 (R. 59) are typical of the leases, assignments and other instruments executed by the parties pursuant to the contract. All contain substantially the same language as to the rights and interests of the parties.

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lips at the *fixed rate* of 4c per Mcf of ¼ of ⅞ of all gas produced measured on a 16.4-pound pressure base. Although the contract refers to the overriding royalty as an "interest" in the gas, it otherwise expressly limits such interest to a cash royalty payment at the 4c rate. Such payment is unaffected by "market value," "proceeds of sale" or what Phillips does with the gas. The contracts expressly provide that Phillips shall become the owner of the gas "when produced" (R. 32)[4] without limitation as to the disposition thereof.

The Contract (R. 34), the parties (R. 45, 51, 55, 119 and 120), the trial court (R. 16) and the Court of Appeals all refer to the payment to Cabot as a "royalty" or "overriding royalty" payment.

Orders of the Commission

On December 9, 1946, (subsequent to the making of the contract, leases and assignments and the development of the properties herein involved), the Commission entered its Order No. 19514 (R. 60-67) providing that from and after January 1, 1947, "no natural gas shall be taken out of the producing structures or formations" of the Guymon-Hugoton Field "at a price, at the wellhead, of less than 7c per thousand cubic feet" measured on a 14.65-pound pressure base. The order was based upon findings by the Commission disclosing the necessity for "producers" to receive the minimum price specified

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[4] Under Oklahoma law no one owns gas before it is produced (See cases cited, *infra*, p. 43, note 18.

for gas produced in the field and the abuses calling for the establishment of a minimum price as a condition to the production of the gas.

By Order No. 19702 entered February 4, 1947 (R. 84-87), the Commission, in denying an application of Phillips to vacate or clarify Order No. 19514, found that waste of gas would result unless *"PRODUCERS* in said *field"*[5] receive or realize the equivalent of the prescribed minimum price therefor; that Order No. 19514 was "meant to prohibit the *production* of natural gas" unless the gas "should be so utilized and/or sold, that the *PRODUCER* would realize therefrom the equivalent" of the prescribed price; and that Phillips was not injured by the order because it was then "realizing from the utilization and sale of natural gas produced by it" in the field the equivalent of such price and was therefore "already complying" with the order.

On July 29, 1952, the Commission entered its further Order No. 26096 (R. 96-101) increasing the minimum price to 9.8262c per thousand cubic feet effective August 1, 1952.

Appeals From the Minimum Price Orders

Orders Nos. 19514 and 19702 were upheld by the Oklahoma Supreme Court and by this Court as applied to the price a *producer* must *realize* as a condition to the production of the gas. *Cities Service Gas Co.* v. *Peerless*

[5] Emphasis in quoted mtaerial in this petition is ours unless otherwise stated.

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Oil & Gas Co., 203 Okl. 35, 220 P. 2d 279, *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, and *Phillips Petroleum Co.* v. *State of Oklahoma*, 340 U. S. 190.

Order No. 26096 was upheld April 27, 1954, by the Oklahoma Supreme Court by a 5 to 4 decision in the case of *Natural Gas Pipeline Co. of America et al.* v. *Corporation Commission of Oklahoma*. Petition for rehearing was denied July 6, 1954. The opinion is not yet officially reported but is to be found at page 831 of Volume 25 of The Journal, an official publication of the Oklahoma Bar Association. As in the appeal from Order No. 19514, the appeal had to do only with sales of gas by *producers* and what such *producers* must *realize* as a condition of production, and *not* what a producer must pay as an overriding royalty.[6]

Theories of the Courts Below

In brief, the opinion of the trial court in this case (114 F. Supp. 953; R. 12) is based on the premise that the contract, leases and assignments herein involved reserved to Cabot ownership of ¼ of ⅞ of the gas *in place in the ground* before production; that by reason

[6] One of the principal grounds urged for rehearing was the decision of this Court in the cases of *Phillips Petroleum Co. v. State of Wisconsin*, No. 280; *State of Texas* v. *State of Wisconsin*, No. 281; and *Federal Power Commission* v. *State of Wisconsin*, No. 418, decided June 7, 1954, as it relates to the authority of the state to regulate the price of gas destined for movement in interstate commerce. Should this Court reverse said decision on appeal from the Supreme Court of Oklahoma the basis for that part of the judgment herein would no longer exist.

thereof Cabot was a "joint owner" of the "leasehold estate" and a "joint producer and seller" of the gas and that Phillips was a "joint producer and purchaser" thereof; and that under the Commission orders, Cabot, a "producer," is required to get and Phillips, the "purchaser," is required to pay the prescribed minimum price.

The majority opinion of the Court of Appeals (210 F. 2d 841, R. 124), although concurring in the view of the trial court as to the ownership of the gas in place, did not adopt the view that Cabot was a joint owner of the "leasehold estate," or was a "joint producer" or "seller," but based the decision on the theory that the orders are a "regulation" of the "first transaction involving the obligation to pay or account for gas," regardless of whether it be what the producer must realize or what the producer must pay to others, and that as such had been upheld by the Oklahoma Supreme Court and by this Court in the case of *Cities Service Gas Co.* v. *Peerless Oil & Gas Co., supra.*

The Court recognized that the constitutional question here presented was not before the courts in that case but concluded nevertheless that the decisions settled the constitutionality of the orders as it construed and applied them.

Subsequent Order of the Corporation Commission in Conflict with the Court of Appeals' Interpretation of the Minimum Price Orders

By order No. 28884 entered July 16, 1954, the Corporation Commission of Oklahoma construed and applied its minimum price orders to the factual situation here involved and decreed as follows:

> "2. That Order No. 19514 in Cause CD No. 1054 and Order No. 26096 in Cause CD No. 3628 shall be interpreted and applied in accordance with the purpose and intent ascribed thereto in Finding No. 5 hereof, which interpretation and clarification of said orders shall become and be treated and regarded as a part of said orders and shall have the same force and effect as if expressly stated in the orders when originally entered.
>
> "3. That no producer in the Guymon-Hugoton Field shall be required by reason of either said Order No. 19514 or Order No. 26096 to pay to the owners of any royalty, overriding royalty or other interest in the gas any sum in excess of that required to be paid by the terms of their contracts."

Finding No. 5 referred to in paragraph (2) of the Order reads as follows:

> "5. Said Order No. 19514 and Order No. 26096 were intended and are to be interpreted and applied as a regulation of the production of gas from the Guymon-Hugoton Field by and to the extent of requiring that a producer, who has the right to operate wells or to take or to market the gas therefrom, receive or realize for the gas so produced a sum equivalent to the prescribed minimum price. In entering said orders the Commission contemplated and intended that the landowners, usual and typical roy-

alty owners, and other persons whose royalty, overriding royalty or other interest in the gas is by contract measured by or dependent upon the market value or proceeds of sale thereof by the producer would under and as a consequence of the terms of their contracts be entitled to payment based upon the minimum price the producer is so required to realize. It was not the intent of the Commission nor the purpose of said orders to modify or affect in any way the contractual basis or rate of royalty or overriding royalty, or other payments required to be paid by such producer or to require that such producer pay the owner of any such royalty, overriding royalty or other interest in the gas a sum in excess of that required to be paid by the contract. The Commission does not consider that it has such authority. To require such producer to pay the owner of a royalty, overriding royalty or other interest in the gas a sum in excess of that required to be paid by their contract would in no way prevent or tend to prevent either physical or economic waste of natural gas, protect or tend to protect the correlative rights of any person or persons owning any interest in the Guymon-Hugoton Field or in any way protect the interest of the public" (See Appendix A for the entire order).

This order was entered upon application of Phillips filed pursuant to the provisions of Sections 112 and 241, Title 52, O. S. 1951, printed in Appendix B.

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals' Decision is Directly Opposed to a Decision of the Corporation Commission of Oklahoma in Respect to the Interpretation and Application of its own Minimum Price Orders which Decision is Conclusive upon the Federal Courts as to the Meaning and Application of said Orders.

(a) The fact that the decision of the Corporation Commission was Subsequent to the Court of Appeals' Decision does not Militate against its Controlling Effect here.

On May 24, 1954, Phillips filed with the Corporation Commission of Oklahoma an application for directions concerning its obligation under the minimum price order to Cabot and The Texas Company, with whom Phillips had contracts for the payment of fixed price overriding royalties in the Guymon-Hugoton field (See Appendix A-1).

After notice and hearing, the Commission, by order entered on July 16, 1954, decreed that it was not the intention of the Commission by its minimum price orders to require producers to pay to fixed price overriding royalty owners, such as Cabot and The Texas Company, any sum in excess of the amount called for by their contracts, and that such interpretation and clarification of said orders should be treated and regarded as a part of said orders with like force and effect as if expressly stated in the orders when originally made. The Commission further found that the orders when construed so as to change contractual provisions for the payment of over-

riding royalties would not prevent waste or protect correlative rights and would be beyond its authority to make.

The Commission also ordered that no producer should be required by reason of said orders to pay to the owners of any royalty or overriding royalty or other interest in the gas any sum in excess of that required to be paid by the terms of their contracts. (See *supra*, p. 11; see also Appendix A for the entire order.)

This proceeding was authorized by Sections 112 and 241, Title 52 O. S. 1951 (See Appendix B).[7]

The Supreme Court of Oklahoma has previously sustained the power of the Commission to interpret, apply and enforce its minimum price orders for gas. *Natural Gas Pipe Line Company of America* v. *Panoma Corporation et al.*, 271 P. 2d 354.[8]

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[7] Sec. 112 authorizes any person affected by any legislative or administrative order to apply to the Commission to repeal, amend, modify, or supplement the same.

Sec. 241 authorizes any person to apply to the Commission for a hearing "upon any question relating to the enforcement of this Act" and confers jurisdiction upon the Commission "to hear and determine the same" after notice and hearing.

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[8] Panoma, a producer, applied to the Commission to require Natural Gas Pipe Line Co., a purchaser of gas from Panoma, to pay the difference between the amount paid by Natural to Panoma under contract and the amount required to be paid under the minimum price order as Panoma construed it, which construction Natural opposed. The Commission agreed with Panoma's construction and ordered Natural to pay the difference. The decision was affirmed by the Supreme Court of Oklahoma. In response to the contention of Natural that the order of the Commission amounted to a money judgment which the Commission was without power to render, the Supreme Court said:

The order of the Corporation Commission is entitled to as much weight (and we submit more, see *infra*, pp. 16-20) in establishing state law and policy as a decision by the New Jersey Chancery Court, which this Court held binding upon the Federal Courts in the absence of a decision by a higher state court. *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169. All the reasons advanced in that case for following the Chancery Court are at least equally persuasive for following the decision by the Corporation Commission *in the interpretation and application of orders which it made.* No other tribunal is equally competent to make that decision.[9]

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[8] *Continued*

"Commission could not enforce it as a money judgment, however, this does not mean that commission is without any power to enforce compliance with its valid price-fixing order. *As in case of any other valid order, commission may require compliance therewith by any other order within its authority, so, in this case, while commission could not require Natural to pay this sum, it could prohibit Natural from taking further gas until it brought itself into compliance with the effective price order by making the payment. If it were otherwise commission would be powerless to take any steps to require compliance with its valid orders in the highly important program of conservation, and might as well not make them.*"

The case is now pending in this Court on appeal, No. 191, October Term, 1954.

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[9] The Corporation Commission has the powers of a court of record. Const. Art. 9, Sec. 19. *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210, *St. Louis & S. F. Ry. Co.* v. *State*, 116 Okl. 95, 244 P. 440.

Only the Supreme Court can review and reverse the decisions of the Corporation Commission. Const. Art. 7, Sec. 10; Art. 9, Sec. 20. Review by the Supreme Court is limited, except when constitutional questions are involved, to determining whether the Commission has regularly pursued its authority and whether its

The Supreme Court of Kansas recently considered the effect of an interpretation by the Corporation Commission of its minimum price order for gas. *Columbian Fuel Corp.* v. *Panhandle Eastern Pipe Line Co.*, 271 P. 2d (Adv. Op.) 773 (June 12, 1954).

The case involved the right of a producer to recover interest upon the difference between the contract price and the minimum price fixed by the Corporation Commission for gas produced. In considering the effect of the Commission's interpretation of its own orders, the Court said (271 P. 2d at 779):

> *"The rule that an administrative body's interpretation of its own rules, orders or regulations, in case of ambiguity, is entitled to great weight—some courts say controlling weight—is universally recognized. Harrison* v. *Masonic Mutual Benefit Society*, 61 Kan. 134, 140, 59 P. 266; *Leavenworth Nat. Bank* v. *Reilly*, 97 Kan. 817, 823, 156 P. 747. *The original order pertaining to payment of differences must be construed in the light of the commission's final order interpreting its intent. Georgia Public Service Comm.* v. *United States*, 283 U. S. 765, 771, 51 S. Ct. 619, 75 L. ed. 1397. When so read all uncertainty of its intent is removed. *An interpretation of an administrative order or regulation by the administrative agency becomes of controlling weight and will not be disturbed unless clearly erroneous or inconsistent with the regulation. Bowles* v. *Seminole Rock Co.*, 325 U. S. 410, 65 S. Ct. 1215, 89 L. ed. 1700."

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[9] *Continued*
findings and conclusions are sustained by the law and substantial evidence. *Cities Service Oil Co.* v. *Anglin*, 204 Okl. 171, 228 P. 2d 191.

Three paragraphs later the Court said:

"Here any possible doubt was completely dispelled by the commission's interpretation of its own order."

The Court went on to say that the suit for recovery of interest was a collateral attack upon the Commission's interpretation of its own order, because the statutes authorized the Commission "to *interpret and enforce* its own rules, orders and regulations *and to determine any right thereunder*, in the manner provided in G. S. 1949, 55-605. See G. S. 1949, 55-706" (Italics by the Court).

The Kansas statutes referred to are substantially like the Oklahoma statutes. It may well be that the Oklahoma Supreme Court would hold that a proceeding before the Corporation Commission, under the circumstances in this case, is the exclusive method of enforcing the minimum price orders, bearing in mind that the Corporation Commission found that Phillips had complied with the order for a substantial portion of the period during which the federal court found that Phillips had *not* complied with the order.

Be that as it may, it is sufficient that the interpretation by the Commission of its own orders is conclusive upon the courts unless plainly erroneous subject only to review in the manner provided by statute.

In *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 413, this Court, in considering a wartime maximum price order, said:

"The problem in this case is to determine the highest price respondent charged for crushed stone dur-

ing March, 1942, within the meaning of Maximum Price Regulation No. 188. Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. *But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.*"

In *West Texas Compress & Warehouse Co.* v. *Panhandle & S. F. Ry. Co.* (Texas), 15 S. W. 2d 558, 560, the Commission of Appeals of Texas, had this to say concerning the construction by the Railroad Commission of Texas of its own order with respect to the shipment and compression of cotton on through bills of lading:

"Since the commission is an instrumentality of the state, exercising delegated powers, its orders are of the same force as would be a like enactment by the Legislature. *It therefore follows that the interpretation officially placed on the order or rule by the commission becomes a part of the rule.*"

To the same effect, see *Foley* v. *Benedict*, 122 Texas 193, 55 S. W. 2d 805.

In 42 Am. Jur., P. 392, Sec. 77, it is said:

"An administrative body has power to interpret its own rules which have the force and effect of law, and such interpretation becomes part of the rule" (Citing *Foley* v. *Benedict, supra*).[10]

[10] The order of the Corporation Commission here under consideration expressly provides that the interpretation and clarification shall be a part of said orders as originally entered (*supra*, p. 11).

Other cases supporting the rule that the interpretation by an administrative body of its own orders is controlling or entitled to great weight are: *Mechanical Farm Equipment Distributors, Inc.* v. *Porter* (1946), 156 F. 2d 296, 297, C.C.A. 9; *Costello* v. *Acco Transport Co.* (1950), 232 S. W. 2d 297, 308, Ct. of App. of Tenn.; *Danielson* v. *Civil Aeronautics Board* (1953), 204 F. 2d 266, 268, C.C.A. 2; *Bowles* v. *Mannie & Co.*, (1946), 155 F. 2d 129, 133, C.C.A. 7; *National Labor Relations Board* v. *J. S. Popper, Inc.* (1940), 113 F. 2d 602, 603, C.C.A. 3; *Peck* v. *Greyhound Corp.* (1951), 97 F. Supp. 679, 681, U.S.D.C., S.D., N.Y.; *State ex rel. Orscheln Bros. Truck Lines, Inc.* v. *Public Service Commission* (K.C. Ct. App., 1937), 110 S. W. 2d 364, 366; *Coast Cities Coaches, Inc.* v. *Mack* (1953) 64 So. 2d 774, 780, S. Ct. Fla. See also 73 C.J.S. 483.

Thus it appears that the decision of the Corporation Commission is conclusive upon the courts as to the meaning of its own orders. But whether regarded as conclusive or as entitled to great weight or merely something to be considered and given such weight in the determination of state law and policy as the court may deem it entitled, it is something which the Court of Appeals did not have before it and something which might well change the result reached by that court. For this reason, the writ should be granted and the decision reviewed by this Court or remanded to the Court of Appeals for reconsideration in the light of the decision of the Corporation Commission. *Huddleston* v. *Dwyer*, 322 U. S. 232.

Even though the judgment below had been in accord with the state court decisions at the time it was rendered, it would have been the duty of this Court to reverse the decision if, in the meantime the state court decisions had been changed. *Huddleston* v. *Dwyer, supra.* Here the state law has not changed, but it has been authoritatively declared to be what the Court of Appeals should have found it to be but did not. (See *infra* pp. 35-45). It is the duty of this Court to see that this authoritative determination of the state law and policy is given effect by the federal courts.

In *Huddleston* v. *Dwyer, supra,* this Court said (322 U. S. at 236):

> " 'Until such time as the case is no longer *sub judice,* the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court.' *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538, 542, 85 L. ed. 327, 330, 61 S. Ct. 347."

II.

The Minimum Price Orders as Construed and Applied by the Court of Appeals Constitute a Taking of Private Property and an Impairment of Private Contract for No Public Purpose, in Violation of the Due Process and Contract Impairment Clauses of the Constitution of the United States.[11]

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[11] They also violate the Due Process and the Impairment of Contract Clauses of the Constitution of Oklahoma, a point which was urged upon the Court of Appeals. The Supreme Court of Oklahoma has not passed upon this question, despite the assertion of the Court of Appeals to the contrary (*infra,* pp. 24-27).

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There is no doubt that the contract here involved provides for an overriding royalty. The majority opinion so characterizes it. There can be no doubt also that under the Oklahoma decisions, as well as under the decisions of the Court of Appeals applying Oklahoma law, an overriding royalty is a consideration for the leases and not a payment for the gas produced. *McCullough* v. *Almach*, 188 Okl. 434, 110 P. 2d 295; *McCullough* v. *Burks*, 185 Okl. 502, 94 P. 2d 541; *Carroll* v. *Bowen*, 180 Okl. 215, 68 P. 2d 773; *Hinkle* v. *Gauntt*, 201 Okl. 432, 206 P. 2d 1001; *Wright* v. *Brush* (10, C.C.A.), 115 F. 2d 265, 267; and *Alexander* v. *King* (10 C.C.A.), 46 F. 2d 235, 239.

It should be borne in mind that most overriding royalties, as well as landowners' royalties, provide for payment on the basis of proceeds of sale by the lessee or the market value of the gas or oil. Such royalties were "typical" in the Hugoton Field (see Plaintiff's Exhibit 44, R. 113, and Stipulation, R. 26). Such was the type of royalty owners mentioned in the Commission's findings and in the Oklahoma Supreme Court opinion in the *Cities Service case*, 220 P. 2d 279, 287.

Cabot's overriding royalty, however, was different. It provided for payment of "(4c) per MCF" times ¼ of ⅞ of the gas produced. Regardless of the "price" or "value" of the gas, whether sold or not sold, the rate of payment remains the same. Cabot's right to a ¼ of ⅞ overriding royalty was acquired as a part and parcel of the 4c price. The fractional interest and the 4c price are inseparable and inextricable. The combination of in-

terest and price was an agreed part of the consideration for the leases which Phillips bought from Cabot. If the price is increased, the fractional interest should be correspondingly reduced. Simple justice requires it.

Cabot and Phillips might well have made this transaction for the cash consideration without any overriding royalty. In that event no one would have said that the minimum price orders would entitle Cabot to anything additional. The overriding royalty might have been 10c per MCF of *1/16* of 7/8 of the gas produced. In that event no one would contend that the price orders would entitle Cabot to anything more. Yet by the circumstance that the parties saw fit to bargain for an overriding royalty of 4c per Mcf of 1/4 of 7/8 (which would amount to a greater sum than the example related above), the Court of Appeals has decreed that the minimum price orders require that several million dollars additional must be paid!

The orders do not require, and we submit do not permit, that cosntruction. See I, *supra*, pp. 13-20; IV, *infra*, pp. 35-45. It is our purpose here however to show that the orders, so construed, violate the Constitution of the United States.

There can be no question but that the effect of the judgment of the Court of Appeals is to require Phillips to pay to Cabot, for Cabot's own private enrichment and in disregard of the contract to the contrary, a huge sum of money (estimated in excess of $3,000,000 during the life of the contract).

Such a deprivation and taking of property cannot be condoned "without a justifying public purpose." *Thompson* v. *Consolidated Gas Utilities Corp.* (1937), 300 U. S. 55, 80. While private contracts are, of course, subject to the exercise of the police power and the public interest, the state "may not, under the guise of protecting the public, arbitrarily interfere with private business, or prohibit lawful occupations, or impose unusual or unnecessary restrictions upon them." *Jay Burns Baking Co.* v. *Bryan* (1924), 264 U. S. 504. The Oklahoma Supreme Court, in the recent case of *Oklahoma Natural Gas Co.* v. *Choctaw Gas Co.* (1951), 205 Okl. 255, 236 P. 2d 970, 977, expressly declared in respect to a so-called conservation order of the Oklahoma Corporation Commission:

> "The police power must at all times be exercised with scrupulous regard for private rights guaranteed by the constitution, and then only in the public interest and not for the benefit of a private company."

No one has or will dispute these basic principles of constitutional law. What public purpose then is served by construing these orders to require Phillips to pay Cabot this huge sum of money? Only two possibilities have been suggested. Cabot says that the orders may be sustained as a waste prevention measure[12]. The Court

[12] In the trial court, respondent in its brief said:

> *"There is no public interest in having Cabot, as an individual corporation, receive any particular sum for its gas under the contract;* however, there is a public interest that a natural resource not be wasted, and the Corporation Commission has found on substantial evidence that to take gas from the Guymon-Hugoton gas pool at less than a specified price constitutes waste." (Cabot's Reply Brief, p. 19.)

of Appeals said that the orders were sustained by the Supreme Court of Oklahoma and by this Court in the interest of waste prevention and the protection of correlative rights (210 F. 2d at p. 844).

Neither the Supreme Court of Oklahoma nor this Court passed upon the orders as here construed and applied, and the *Cities Service case* does not support the decision below. Moreover, the orders cannot be sustained as waste prevention or correlative rights protection.

It is most significant and should be controlling that the Corporation Commission has disclaimed any purpose or power to enter orders as construed by the court below for the prevention of waste or the protection of correlative rights. On the contrary the Commission found as a fact that the orders as so construed would not accomplish such purposes (See *supra*, p. 12).

The Cities Service Case did not Settle the Constitutional Question Here Presented

Having so construed the orders as to raise a grave constitutional question (although the orders are clearly susceptible to a construction which would involve no constitutional question) the Court of Appeals resolved that question in favor of validity without making an independent examination of the constitutionality of said orders as it had construed and applied them, but in relying upon the decision of the Supreme Court of Oklahoma and the Supreme Court of the United States in *Cities Service Gas Company* v. *Peerless Oil and Gas Company*,

203 Okl. 35, 220 P. 2d 279, 340 U. S. 179, as having settled the constitutionality of said orders, notwithstanding said Courts had for consideration the constitutionality of the first order as construed and applied to an entirely different situation and bringing about a wholly different result. The record in the *Cities Service case* presented and the Supreme Court of Oklahoma and this Court decided the validity of said order insofar as it required producers of gas to *receive*, and the *purchaser* of gas from the producer to *pay* the minimum prices, with such benefits as might flow therefrom to royalty owners, the state and others whose interests (by the express provisions of contracts as to royalty owners and by express statutes as to the state) are affected or controlled by the amount which the producer receives or by the market value of the gas.[13]

The holding by the Court of Appeals that the constitutional questions here presented were decided by this Court in *Cities Service Gas Co.* v. *Peerless Oil and Gas Co.*, 340 U. S. 179, constitutes grave error.[14] A statute or legislative order may be generally constitutional and

[13] The usual royalty provision, and the typical royalty provision in leases in the Hugoton field, provides for "⅛ of the proceeds" or "⅛ of the market value" of the gas produced (R. 113).

[14] The Court of Appeals recognized that the question here presented was not before the Courts in the *Cities Service case*, but concluded that they passed upon the question any way. The Court said (210 F. 2d at p. 845):

> "While the specific question before the Oklahoma Court was as stated by Phillips *the validity of the order with respect to the rights and liability of Phillips as to the gas it purchased from Peerless Oil and Gas Company, the Oklahoma Supreme*

valid when applied in one manner or to one state of facts or situation or to one person or class of persons, and yet be invalid in its application in another manner or to another state of facts or situation or to another person or class of persons.

This Court in the case of *Watson* v. *Buck*, 313 U. S. 387, 402, said:

> "A law which is constitutional as applied in one manner may still contravene the Constitution as applied in another. Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications, courts have in the main found it wiser to delay passing upon the constitutionality of all the separate phases of a comprehensive statute *until faced with cases involving particular provisions as specifically applied to persons who claim to be injured*. Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case."

See also *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 289.

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[14] *Continued*

Court did not there decide only that narrow question. It viewed and considered the scope and effect of the statute and the powers of the Commission thereunder in its broadest aspect *and passed upon the constitutionality of all phases thereof* both with respect to the State and Federal Constitutions."

(The Court was in error in speaking of Phillips' purchases of gas from Peerless. It was the purchase of gas by *Cities Service*, a pipe line purchaser, from Peerless, a producer, that was involved in the *Cities Service case*. Phillips purchased no gas from Peerless. 340 U. S. 179).

There was nothing in the record in the *Cities Service case* to bring to the Court's attention the fact that there was such a thing as a lease purchase contract or overriding royalty payment in the Hugoton Field like that here involved. The court had before it no controversy between Cabot and Phillips or others in a like situation. The land and royalty owners present in the case were lessors under "typical leases" whose royalty was based on ⅛ of the "proceeds" received by the "lessee * * * from the sale of the gas" if sold, or if not sold, ⅛ "of its market value at the well."[15] The benefits of the order flowed to them by reason of the express terms of their lease contracts. No regulation of or change in the *contractual basis* of their royalty payments or other impairment of any lease or lease purchase contract was involved.

The Orders as here Construed and Applied do not Tend to Prevent Waste

It is impracticable if not impossible to produce all the gas existing in a gas reservoir. Conservation aims to recover the greatest amount reasonably recoverable before abandoning producing wells leaving unrecovered and lost forever such quantities of gas as cannot be economically produced. The volume of gas that can be produced gradually declines in all fields. When the volume that can be produced from day to day multiplied by the price that can be obtained for the gas ceases to

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[15] *Cities Service Gas Co.* v. *Peerless Oil and Gas Co.*, 203 Okl. 35, 220 P. 2d 279, 287.

exceed the costs of operating a well, the well is plugged and abandoned. Obviously the greater the price that can be obtained for the gas the longer a well can be economically operated. Conversely, the greater the costs imposed upon the producer the earlier a well will be economically unprofitable and will be abandoned. Not only do the receipts minus the costs motivate the producer in the interest of his own solvency, but the typical forms of oil and gas leases, such as here involved, provide that they shall terminate if after a stated period (called the primary term) the property leased ceases to produce oil or gas *in paying quantities*. Thus the lessee actually loses title and is required to plug and abandon his wells when his receipts for the gas or oil produced fail to exceed his costs of operating the lease. *Gypsy* v. *Marsh*, 121 Okl. 135, 248 P. 329, 48 A. L. R. 876.

In the *Cities Service case* the Supreme Court of Oklahoma and this Court considered the validity of the 7c minimum price order as applied to producers such as Peerless and Phillips. The effect of the order was to require those producers to receive for the gas which they produced the minimum price of 7c per Mcf. Naturally, if they were not already receiving that amount, the effect of the order was to increase their revenues with the consequence that their wells could be produced for a longer period of time or to a nearer point of exhaustion than would otherwise be the case. Contrasted with that situation, the minimum price orders as construed and applied by the Court of Appeals, instead of providing additional revenue for the producers

from the production of gas, impose additional costs upon the producers. The result necessarily will be that the net revenue from the production of gas will be decreased with the inevitable consequence that production will be abandoned at an earlier stage, leaving greater quantities of gas in the ground unproduced and unrecoverable than would otherwise be the case.[16] The result of the decision below will therefore be irreparable damage not only to petitioner but to the state, to consumers and to the nation.

To say therefore that the *Cities Service case* sustained the constitutionality of the orders as here construed as a waste prevention measure is to say that opposites are alike.

The Orders as here Construed and Applied do not Protect Correlative Rights

The *Cities Service case* sustained the constitutionality of the 7c order as there applied on the additional ground that it protected correlative rights. In holding the

[16] It may be contended that the orders rqeuire the producer to receive for his gas the minimum price as well as to pay overriding royalties at the minimum price, and inasmuch as his interest in the production exceeds that of his royalty owners', the net result of the orders is an increase in revenue to the producer. The answer is obvious and is illustrated by the facts of this case. Petitioner was already receiving the minimum price of 7c when the first order was made, as was decided by the Commission and by the Supreme Court of Oklahoma. *Cities Service Gas Company* v. *Peerless Oil and Gas Company*, 203 Okl. 35, 220 P. 2d 279. Phillips therefore received no increase in revenue under the 7c order, but under the decision of the Court of Appeals is required to increase its payment to Cabot from 4c, as provided by the contract, to 7c per Mcf times ¼ of ⅞ of the gas produced.

decisions applicable to the orders as here construed and applied the Court of Appeals has obviously misconceived the meaning of the term "correlative rights."

No correlative rights are involved here. The doctrine of correlative rights has to do with the situation where each owner or lessee of *separately owned tracts* by the very nature of things has a coequal right to drill on his own land and take gas from the common reservoir without control by or over the other.[17] Summers Oil and Gas (2d Ed.), Vol. 1, Section 63, p. 180, defines the term "correlative rights" as follows:

> "The term 'correlative rights' is merely a convenient method of indicating that each owner of land in a common source of supply of oil and gas has legal privileges *as against other owners* of land therein to take oil or gas therefrom by lawful operations conducted on his own land limited, however, by duties to other owners not to injure the source of supply and by duties not to take an undue proportion of the oil and gas."

The doctrine does not apply as between those having interests in the same land who by contract agree as to their respective rights and obligations. This is recognized by the Supreme Court of Oklahoma in the case of *Oklahoma Natural Gas Co.* v. *Choctow Gas Co.*, 205 Okl. 255, 236 P. 2d 970, 977, where it said:

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[17] *Ohio Oil Co.* v. *State of Indiana*, 177 U. S. 190; *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210; *Bandini Petroleum Co.* v. *Sup. Ct. of California*, 284 U. S. 8; *Patterson* v. *Stanolind Oil & Gas Co.*, 182 Okl. 155, 77 P. 2d 83; *Alphonzo E. Bell Corp.* v. *Bell View Oil Syndicate*, 24 Cal. App. (2d) 587, 76 P. 2d 167; *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55.

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"Neither was it to protect correlative rights in the common source of supply, *this doctrine being based upon protection of landowners and royalty owners against unfair taking by one not their lessee.*"

Cabot's rights under the contract are in no sense "correlative rights or interests." The payments to which it is entitled are purely a matter of right between two parties to a contract voluntarily entered into for a valuable consideration.

It is respectfully submitted therefore that the *Cities Service case* cannot fairly be said to have sustained the validity of the orders as here construed and applied on the ground of waste prevention or the protection of correlative rights.

It is also clear that the orders as here construed and applied cannot be sustained on the ground of waste prevention or the protection of correlative rights. It appears therefore that there is no public purpose to be served by requiring Phillips to pay Cabot the additional sum of money over and above the contract price for the leases, and the orders as so construed and applied violate Section 10 of Article 1 and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

III.

The Constitutional Questions Here Presented Could Have and Should Have Been Avoided by the Court of Appeals

(1) It is elementary that when a statute or order is susceptible to more than one construction, one of which

will render it unconstitutional, or even raise grave doubts of its constitutionality, the other construction will be adopted. *United States* v. *La Franca*, 282 U. S. 568, 574; *Kansas Gas & Electric Co.* v. *City of Independence, Kansas*, 79 F. 2d 32, 43; *Baccus* v. *Banks*, 199 Okl. 647, 192 P. 2d 683, 687.

The Court of Appeals therefore should have held that the orders did not apply to a fixed price overriding royalty and avoided the constitutional questions here raised. There can be no doubt that the orders are susceptible to that construction. Indeed it is the only construction that can be supported. See IV, *infra*, pp. 35-45.

(2) In interpreting and applying the minimum price orders for gas the federal courts are enmeshed in "as thorny a problem as has challenged the ingenuity and wisdom of legislatures." See *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 579; *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 318. It is the established policy of this Court that the federal courts should avoid passing upon questions of state law and policy concerning state conservation laws wherever possible. The evils resulting from federal court decisions of state law and policy before the state courts have passed upon them are forcefully pointed out by this Court in *Burford* v. *Sun Oil Co.*, *supra*.

The Court of Appeals therefore should have stayed further proceedings pending interpretation of the minimum price orders by the state courts or by the Commission that made them. *Shipman* v. *DuPre* (1950), 339 U. S. 321; *Railroad Commission of Texas* v. *Pullman*

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Co. (1941), 312 U. S. 496; *Spector Motor Service* v. *McLaughlin* (1944), 323 U. S. 101; *Chicago* v. *Fieldcrest Dairies* (1942), 316 U. S. 168.

The doctrine of primary administrative jurisdiction as applied by this Court to federal administrative agencies (*Slocum* v. *Del. L. & W. R. Co.*, 339 U. S. 239, see Annotations 94 L. ed. 806, and 96 L. ed. 585), should apply with even greater force to state administrative agencies. The record here discloses a situation where the federal courts have taken over the conservation authority of the Corporation Commission by construing and applying its orders in a manner directly contrary to the intent and purpose of the Commission.

The pendency of an appeal in the Supreme Court of Oklahoma from the order increasing the minimum prices, challenging the constitutionality of the order, with the ultimate decision, in all probability, to be made by this Court upon appeal from the Supreme Court of Oklahoma is an additional reason the Court of Appeals should have stayed further proceedings. If the order is stricken down, a substantial part of the judgment in this case will be without basis.

The incongruous result of the federal court resolving for itself questions of state law and policy is demonstrated by this case. Should the judgment of the Court of Appeals be allowed to stand, Cabot will recover from Phillips a substantial sum of money based upon the supposed intent of the Corporation Commission, when the Commission has said and formally decreed that its intent

was, and that the conservation of gas requires, the opposite to what the Court of Appeals determined.

This Court should not sanction the enrichment of Cabot at the expense of Phillips upon a definitely established mistake of the Court of Appeals in ascertaining the intent and purpose of the Corporation Commission of Oklahoma.

All the reasons for relegating the parties to state tribunals and all the vices for failure to do so pointed out by this Court in *Burford* v. *Sun Oil Co., supra*, are present here. This includes the system established by the Oklahoma legislature for fact finding and policy making by the Corporation Commission with review by the Supreme Court and the expeditious procedure for resolving questions such as the one here presented. This case fits squarely into the language of this Court in the *Burford case* (319 U. S. at p. 327).

But for the circumstance that petitioner and respondent were incorporated under the laws of different states, this action would necessarily have been brought in a state court and petitioner would have had the right of appeal to this Court from a decision such as the one rendered by the Court of Appeals if made by the highest court of a state (28 U. S. C. 1257[2]). The mere circumstance of diversity of citizenship should not be allowed to deprive petitioner of review by this Court of the serious constitutional question here presented, in the exercise of this Court's discretion in respect to certiorari.

IV.

The Court of Appeals Misinterpreted and Misapplied the Minimum Price Orders to the Fixed Price Overriding Royalty and Violated Settled State Law in Respect to the Ownership of Oil and Gas in Place

(a) The Court of Appeals' Interpretation is in Conflict with the Language of the Orders, with Their Basic Purpose, and with the Findings of the Commission.

What we have to say here is in addition to the very vital point covered in I, *supra*, pp. 13-20. If our contentions there made are sustained it will be unnecessary for the Court to consider this point.

Standing alone, this subdivision (a) is one with which this Court ordinarily would not concern itself. *Huddleston* v. *Dwyer*, 322 U. S. 232, 237. But in view of the fact that the interpretation and application of the orders by the Court of Appeals has presented a serious constitutional question (see II, *supra*, p. 20), this Court is concerned in determining whether the constitutional question could have and should have been avoided by a different interpretation of the orders and in determining whether the situation was such that the Court of Appeals should have declined to interpret the orders until the state tribunals had interpreted them (see III, *supra*, p. 31). Moreover, this subdivision (a) is an important introduction to subdivision (c) of the same point (*infra*, p. 42), which is one of the grounds for granting certiorari specified by the rules of this Court (Rule 19-1[b]).

Findings of Price Orders

The Court states in its opinion that "it is to be noted that the orders by the Commisison do not refer to *sales or purchases by producers.*" Neither the orders, the record nor the findings on which the orders were based mention "*purchases by producers.*"

The orders do, however, contrary to the statement by the Court, repeatedly refer to "sales * * * by producers" and the "price" received *by the producers* therefor.

Except for the findings referred to below *all* of the findings of both the 7c order and the 9.8262c order have to do *exclusively* with market conditions and prices as they relate to sales by or what the producer realizes for the gas or as they may affect persons whose rights by contract or otherwise are measured by or are dependent upon market conditions or prices. Cabot is not in this class inasmuch as its rights are not measured by or dependent on "market conditions" or "price" in the field.

The *only* findings or reference in either of the two orders that mention royalty owners or others than the producers or the purchasers from producers are Findings Nos. 6 and 32(c) and (d) of the 7c order and Finding No. 7 of the 9.8262c order. Finding No. 6 of the 7c order finds that "the Texas County Land and Royalty Owners Association and the School Land Commission of the State of Oklahoma are the owners of minerals situated and located in the common source of supply aforesaid and are therefore interested in the matters and things

involved herein." Finding No. 32(c) of the 7c order and Finding No. 7(c) of the 9.8262c order find that the taking of gas from the field at "prices" prevalent in the field causes "loss to the royalty owners in said field" and "loss to the State of Oklahoma in revenues in the form of gross production taxes." These are the only findings that would give the slightest indication of an interest on the part of the Commission in what others than the producer may receive.

These last named findings can only have reference to those royalty owners and the State whose rights and interests are directly measured by or are related to market value or what the *producer receives*. The State, referred to in Finding No. 32(d) of the 7c order and 7(d) of the 9.8262c order, is in the same situation as the typical royalty owners. Its gross production tax is measured by a percentage of the market value of the gas. Section 821, Title 68, O. S. 1951.

The purpose of the orders as applying only to sales and the amount realized by the producer is made clear by the findings of the Commission in Order No. 19702 (R. 84) denying Phillips' application to either vacate or clarify the 7c order. Order No. 19702 finds that Phillips was complying with the 7c order because it *as a producer* was itself realizing the equivalent of the 7c minimum price. Finding No. 5 of Order No. 19702 (R. 86) recites that "said orders *were meant* to prohibit the production of natural gas from the producing formations in

said field unless same was *sold*, * * * but if not sold, that said gas should be utilized and/or sold, *that the producer would realize therefrom* the equivalent of 7c per thousand cubic feet * * *." Finding No. 6 (R. 86) finds "that inefficient and wasteful utilization of natural gas produced in said field have resulted and will result, *unless producers in said field* receive for said natural gas or realize the equivalent of 7c per thousand cubic feet of natural gas at the wellhead, * * *." The further findings of Finding No. 6 (R. 86) with respect to discrimination adversely affecting "many producers and royalty owners" and the dissipation and waste of gas to the "detriment of the producers, royalty owners, School Land Commission, and the State of Oklahoma," like Findings Nos. 32(c) and (d) of the 7c order and 7(c) and (d) of the 9.8262c order, can have only to do with those producers and royalty owners, the State of Oklahoma *et al.*, whose rights and interests are measured by the field price and who for that reason are benefited if the price is high or injured if the price is low.

Purposes of Orders

The further fact that *conclusively* demonstrates that the minimum price orders were not intended to apply to a situation such as here involved is that such an application of the orders has no reasonable relationship to the stated purposes of the orders.

The Commission in Finding No. 34 of the 7c order (R. 67) and Finding No. 13 of the 9.8262c order (R.

100), which are identical except for the specified price, expressly states that the orders are entered "for the purpose of preventing waste, economic and physical, of natural gas, for the purpose of protecting correlative rights, and to assure the greatest ultimate recovery of natural gas from the reservoir * * *." In referring to the 7c order and the appeal thereof to the Supreme Court of Oklahoma and the Supreme Court of the United States, Finding No. 5 of the 9.8262c order (R. 98) finds that those courts "upheld the jurisdiction of the Corporation Commission to fix the price of gas in this particular field *for the purpose of conservation and the protection of correlative rights.*" In Order No. 24745 (R. 95) the Commission, in referring to the 7c order, said, " * * * the prevention of waste * * * is the basic purpose of said order."

The orders as here applied have no reasonable relation to either of said purposes, as we have shown (see II, *supra*, pp. 27-31).

So long as Phillips, the producer, obtains the required price for the gas and is thus able as the producer to fully and properly develop the properties and obtain therefrom its fair share of the gas in the reservoir, the interests of conservation are promoted and the correlative rights of both Phillips and Cabot are fully protected in relation to like rights of *adjoining* landowners.

Since, therefore, the application of the orders to payments by Phillips to Cabot in no way accomplishes or has any reasonable relationship to the express purposes

of the orders, then certainly the orders cannot be construed to apply to such payments.

What we have said above is not inconsistent with but is supported by the decision of the Oklahoma Supreme Court in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 203 Okl. 35, 220 P. 2d 279, 286, 287, 288.

Everything said in that case concerning royalty owners shows that the Court was thinking only of the conventional or "typical" royalty owners whose royalty depends upon the sale price of the gas by the producer or the market value thereof.

It is clear that the court there considered the order as fixing the price that the producer should receive for the gas as a condition to production, with the resultant benefits to the State, to royalty owners and others whose interests depend upon the price which the producer received, or the market value of the gas. There was no suggestion in that opinion that the order could conceivably apply to change the terms of a contract which provided for a fixed overriding royalty such as that here involved.

(b) As Construed and Applied by the Court of Appeals, the Minimum Price Orders Exceed the Statutory Power of the Corporation Commission.

It goes without saying, in the absence of clear and unmistakable language, that the orders will not be construed in such way as to exceed the authority of the Commission to make them.

The Supreme Court of Oklahoma said in the *Cities Service case* (203 Okl. 35, 220 P. 2d 279) that the 7c minimum price order (the only one before it) was entered pursuant to the authority of the last sentence of Section 239, Title 52, Oklahoma Statutes 1941 (now (1951), reading as follows:

> "The said commission is authorized and directed * * * to regulate the taking of natural gas from any or all such common sources of supply within the state, *so as to prevent waste, protect the interests of the public, and of all those having a right to produce therefrom, and to prevent unreasonable discrimination in favor of any one such common source of supply as against another.*"

In referring to such authority the court said:

> "The standard to guide the Commission in acting thereunder is the prevention of waste, the protection of the interest of the public, and the protection of the interest of all those having a right to produce from such common source of supply" (220 P. 2d 288).

We have already seen that the orders as construed and applied below do not prevent waste, do not protect any interest of the public, and do not protect correlative rights. The statutory provision concerning the protection "of all those having a right to produce from such common source of supply," is the same thing as correlative rights. Cabot, of course, has no right to produce, it having conveyed all of its rights to produce to Phillips. Cabot's rights, which are limited to the receipt of the overriding royalty payment, are fully protected when Phillips' rights as the producer are protected. Cabot's roy-

alty is measured in direct proportion to the amount of gas produced by Phillips.

To require Phillips to pay Cabot substantially double the amount provided for in the contract between the parties is not the "protection" of anybody's "right," but on the contrary, is to arbitrarily take from Phillips and confer upon Cabot a "right" to which Cabot is not entitled under the terms of the contract, without serving any purpose specified by the statute under which the Commission derives its authority.

(c) In Interpreting the Minimum Price Orders, the Court of Appeals has Violated Settled Law in Oklahoma in Respect to the Ownership of Oil and Gas in Place.

The Court of Appeals said (210 F. 2d at p. 843):

"The clear import of the regulations is that the first transaction involving the obligations *to pay or account for gas* removed from the producing horizon must be at the prices at the well head as fixed in the regulations. Thus if an operator removes its own gas it must receive the prices fixed in the order at the well head *and if it acquires the interest in the gas reserved to others* it must pay or account to them for the minimum prices fixed at the well head.

"*It is not correct to say that Cabot owned no interest in the gas in place.*

* * * * * * *

"The contract between Phillips and Cabot recognizes a *right in Cabot to an interest in the gas in place.* In the contracts and leases the *parties treated Cabot as the owner of the gas.* * * * Such provisions are wholly inconsistent with the premise that Phillips became the owner of all the gas at the instant

of production and that Cabot had no interest therein."

The result is that a Federal Court in this case has adopted a rule of ownership of gas in place contrary to the repeated decisions of the Supreme Court of Oklahoma holding that oil and gas by their very nature are not "capable" or "susceptible" of ownership prior to production.[18]

The case of *Rich* v. *Doneghey*, 71 Okl. 204, 177 P. 86, holds that regardless of the contract of the parties purporting to provide otherwise, that "no title" or "estate" could vest before production. In the case of *Sunray Oil Co.* v. *Cortez Oil Co.*, 188 Okl. 690, 112 P. 2d 792, 793, the court said that "no title to any corporeal right or *interest*" could vest before production. A number of the cases say that "*no title*" vests prior to production. It cannot be said that Cabot owns "an interest" in the gas in place before production which it sells to Phillips, in the face of the Oklahoma rule that *no title* or *no estate* can vest before production.

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[18] A few such cases are: *Kolachny* v. *Galbreath* (1910), 26 Okl. 772, 110 P. 902, 906; *Frank Oil Co.* v. *Belleview Gas & Oil Co.* (1911), 29 Okl. 719, 119 P. 260, 261; *Priddy* v. *Thompson* (8 C.C.A., 1913), 204 F. 955, 960; *Rich* v. *Doneghey* (1918), 71 Okl. 204, 177 P. 2d 86, 89-90; *Garfield Oil Co.* v. *Champlin* (1920) 78 Okl. 91, 189 P. 514, 515; *Carter* v. *Rector* (1922), 88 Okl. 12, 210 P. 1035, 1036; *Crain* v. *Pure Oil Co.* (8 C.C.A., 1928), 25 F. 2d 824, 826-827; *Alexander* v. *King* (10 C.C.A., 1931), 46 F. 2d 235, 238-239, 74 A.L.R. 174, cert. denied 283 U. S. 845, 75 L. ed. 1455; *Alexander* v. *Continental Petroleum Co.* (10 C.C.A., 1933), 63 F. 2d 927, 928; *Cuff* v. *Koslosky* (1933), 165 Okl. 135, 25 P. 2d 290; *White* v. *McVey* (1934), 168 Okl. 19, 31 P. 2d 850; *American Oil & Refining Co.* v. *Cornish* (1935), 173 Okl. 470, 49 P. 2d 81; *United States* v. *Stanolind Crude Oil*

In *Replogle* v. *Indian Territory Illuminating Oil Co.*, 193 Okl. 361, 143 P. 2d 1002, the Court held that no title to gas in place could be reserved by the lessor, hence, the payment of royalty under the terms of a lease was not the payment of the purchase price of gas.

The Court of Appeals apparently recognizes the existence of these decisions but seems to regard them as being inconsistent with themselves and with an Oklahoma statute. (See 210 F. 2d at p. 843).

Contrary to the Court's statement, not a single one of the Oklahoma cases we have been able to find (and the Court cites none) holds that a conveyance or reservation of mineral rights separate and apart from the right to explore and produce the same *"constitutes an interest in such minerals."* There are cases which hold that such a conveyance is a grant of an interest in or affecting the *land* but not an "interest" in the "minerals." *Cuff* v. *Koslosky* (1933), 165 Okl. 135, 25 P. 2d 290; *Martin* v. *Atkinson, Warren & Henley Co.* (1945), 195 Okl. 19, 154 P. 2d 945; *Cornelius* v. *Jackson* (1948), 201 Okl. 667, 209 P. 2d 166, appeal dismissed 335 U. S. 906, 93 L. ed 440.

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[18] *Continued*

Purchasing Co. (10 C.C.A., 1940), 113 F. 2d 194, 198; *Sunray Oil Co.* v. *Cortez Oil Co.* (1941), 188 Okl. 690, 112 P. 2d 792, 793; *Harmon* v. *Oklahoma Tax Commission* (1941), 189 Okl. 475, 118 P. 2d 205, 208-209; *Replogle* v. *Indian Territory Illuminating Oil Co.* (1943), 193 Okl. 361, 143 P. 2d 1002, 1007; *Continental Supply Co.* v. *Marshall* (10 C.C.A., 1945), 152 F. 2d 300, 305-306; *Magnolia Petroleum Co.* v. *Ball* (1950), 203 Okla. 514, 223 P. 2d 136.

The only right or interest in the gas which Cabot had or could have as the gas lessee or fee owner of gas rights was the right to explore for and reduce the gas to possession and thereupon acquire title to the same (*Rich* v. *Doneghey*, 71 Okl. 204, 177 P. 86, 90). Cabot assigned all these rights to Phillips. All Cabot reserved was the right to be paid a fixed sum measured by the amount of gas produced — an overriding royalty. That right is an interest in the *land* — a valuable property right which Cabot can convey, as the Oklahoma Supreme Court said in *Magnolia Petroleum Co.* v. *Ball*, 203 Okl. 514, 223 P. 2d 136, but that is far from saying that it is title to any interest in the gas. Cabot's override, its "interest in the land," its "valuable property right which may be conveyed" does not pass to Phillips as the gas is produced, as title to the gas would if Cabot owned it in place.

The Court of Appeals was in error therefore in concluding that the Oklahoma cases are in any way inconsistent in their holdings that no one owns gas or oil in Oklahoma before it is produced and reduced to possession.

Citing the Oklahoma statute in the face of explicit decisions of the Oklahoma Supreme Court since the statute was enacted can only mean that the Court of Appeals thought the Oklahoma Court had erred in determining the state law.

It is the duty of the Court of Appeals to follow the decisions of the state courts "whether believed to be sound or unsound." *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 180.

CONCLUSION

It is respectfully submitted that a Writ of Certiorari should be granted and that the decision of the Court of Appeals should be reversed, or the case remanded to the Court of Appeals for reconsideration in the light of the order of the Corporation Commission of Oklahoma interpreting and applying the minimum gas price orders differently than did the Court of Appeals.

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AUGUST, 1954.

APPENDIX "A"

BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

CAUSE CD No. 5748

ORDER No. 28884

Application of Phillips Petroleum Company for an Order Clarifying Order No. 19514 in Cause CD No. 1054, and Order No. 26096 in Cause CD No. 3628, and for an Order in Respect to Fixed Overriding Royalty Payments in the Guymon-Hugoton Field, Texas County, Oklahoma.

REPORT OF THE COMMISSION

This cause came on for hearing before the Corporation Commission of the State of Oklahoma on the 9th day of June, 1954, at 10 o'clock, a.m., in the Commission's Courtroom, Capitol Office Building, Oklahoma City, Oklahoma: the Honorable Ray O. Weems, Vice-Chairman and Ray C. Jones, Commissioner, sitting.

R. M. Williams and Cecil C. Hamilton appeared for Phillips Petroleum Company; Robert M. Rainey, Streeter B. Flynn and Homer D. Johnson appeared for Cabot Carbon Company; Fisher Ames appeared for The Texas Company; and Floyd Green, Conservation Attorney and Ferrill Rogers, Assistant Conservation Attorney, appeared for the Corporation Commission.

When the cause was called, Cabot Carbon Company and The Texas Company filed and presented their separate motions to dismiss the application on the grounds the Commission was without jurisdiction and that the application was frivolous, which motions were heard and taken under advisement by the Commission, follow-

ing which the hearing was continued to June 11, 1954, at 10 o'clock, a.m. When the cause was called for hearing on June 11, 1954, at 10 o'clock a.m., all parties announced ready and the Commission proceeded to hear the cause. At the conclusion of the hearing on June 11, 1954, the cause was continued for further hearing to June 22, 1954, at 10 o'clock, a.m., on which date the hearing was further continued to June 23, 1954, at 10 o'clock, a.m. The cause came on for further hearing on June 23, 1954, at 10 o'clock, a.m., and at the conclusion of the hearing on that date was continued to July 9, 1954, at 10 o'clock, a.m., for further hearing. At the conclusion of the hearing on July 9, 1954, the Commission closed the cause and took the same under advisement.

Now, on this 16th day of July, 1954, the Commission having considered the matter in conference and being well and sufficiently advised in the premises, grants the application herein and makes the following findings and orders in respect thereto.

FINDINGS

1. This is an application by Phillips Petroleum Company, a producer of gas in the Guymon-Hugoton Field in Texas County, Oklahoma, for an order of the Commission interpreting and clarifying Order No. 19514 entered by the Commission in Cause CD No. 1054 and Order No. 26096 entered by the Commission in Cause CD No. 3628 in respect to the application of said orders to overriding royalty payments which by contract are payable by applicant, or other producers similarly situated, at a fixed rate or on a basis not dependent upon or measured by the market value or the proceeds of sale of the gas, and for an order directing that a producer shall not be required by reason of said Order No. 19514 or

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Order No. 26096 to pay the owner of any such overriding royalty interest in the Guymon-Hugoton Field any sum in excess of that expressly required to be paid by the terms of the overriding royalty contract, and for such other and appropriate action as may be proper in the premises.

2. Due and proper notice of the filing of said application and of the time and place of the hearing thereof has been given in all respects as by law required and that the Commission has jurisdiction over the subject matter of said application; that the separate motions of Cabot Carbon Company and The Texas Company to dismiss the application herein should be denied.

3. The Commission, by its Order No. 19514, entered in Cause CD No. 1054, on December 9, 1946 provided that from and after January 1, 1947, no gas shall be produced from the Guymon-Hugoton Field at a price at the wellhead of less than 7c per thousand cubic feet measured at a pressure of 14.65 pounds per square inch absolute, and by its Order No. 26096 entered in Cause CD No. 3628 on July 29, 1952, increased such minimum price effective from and after August 1, 1952, to 9.8262c per thousand cubic feet.

4. The Commission by findings contained in its Order No. 19702 entered in Cause CD No. 1054, on February 4, 1947, interpreted said Order No. 19514 to prohibit the production and sale of gas from said field unless the "producer" realized therefrom the equivalent of the prescribed minimum price at the wellhead, and further found that Phillips Petroleum Company was at that date in compliance with said order because it, as a producer was realizing the equivalent of the prescribed minimum price for the gas produced by it from said field.

5. Said Order No. 19514 and Order No. 26096 were intended and are to be interpreted and applied as a regulation of the production of gas from the Guymon-Hugoton Field by and to the extent of requiring that a producer, who has the right to operate wells or to take or to market the gas therefrom, receive or realize for the gas so produced a sum equivalent to the prescribed minimum price. In entering said orders the Commission contemplated and intended that the landowners, usual and typical royalty owners, and other persons whose royalty, overriding royalty or other interest in the gas is by contract measured by or dependent upon the market value or proceeds of sale thereof by the producer would under and as a consequence of the terms of their contracts be entitled to payment based upon the minimum price the producer is so required to realize. It was not the intent of the Commission nor the purpose of said orders to modify or affect in any way the contractual basis or rate of royalty or overriding royalty, or other payments required to be paid by such producer or to require that such producer pay the owner of any such royalty, overriding royalty or other interest in the gas a sum in excess of that required to be paid by the contract. The Commission does not consider that it has such authority. To require such producer to pay to the owner of a royalty, overriding royalty or other interest in the gas a sum in excess of that required to be paid by their contract would in no way prevent or tend to prevent either physical or economic waste of natural gas, protect or tend to protect the correlative rights of any person or persons owning any interest in the Guymon-Hugoton Field or in any way protect the interest of the public.

V

ORDER

IT IS THEREFORE ORDERED by the Corporation Commission of the State of Oklahoma as follows:

1. That the separate motions of Cabot Carbon Company and The Texas Company to dismiss the application herein be, and the same are hereby, denied.

2. That Order No. 19514 in Cause CD No. 1054 and Order No. 26096 in Cause CD No. 3628 shall be interpreted and applied in accordance with the purpose and intent ascribed thereto in Finding No. 5 hereof, which interpretation and clarification of said orders shall become and be treated and regarded as a part of said orders and shall have the same force and effect as if expressly stated in the orders when originally entered.

3. That no producer in the Guymon-Hugoton Field shall be required by reason of either said Order No. 19514 or Order No. 26096, to pay to the owners of any royalty, overriding royalty or other interests in the gas any sum in excess of that required to be paid by the terms of their contract.

4. If any paragraph, sentence or phrase of this order should for any reason be declared invalid by any court of competent jurisdiction, such invalidity shall not in any way invalidate or affect any other paragraph, sentence or phrase of this order, but the same shall continue in full force and effect.

DONE AND PERFORMED this 16th day of July, 1954.

CORPORATION COMMISSION
OF OKLAHOMA

Ray O. Weems, Chairman
Ray C. Jones, Vice-Chairman

ATTEST:
Tom McMurrary, Secretary

APPENDIX "A-1"

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

CAUSE CD NO. 5748

Application of Phillips Petroleum Company for an Order Clarifying Order No. 19514 in Cause CD No. 1054 and Order No. 26096 in Cause CD No. 3628 and for an Order in Respect to Fixed Overriding Royalty Payments in the Guymon-Hugoton Field, Texas County, Oklahoma.

APPLICATION

Phillips Petroleum Company, a producer of gas in the Guymon-Hugoton Field in Texas County, Oklahoma, hereby makes application for an order by the Commission clarifying Order No. 19514 in Cause CD No. 1054 and Order No. 26096 in Cause CD No. 3628 and for an order in respect to overriding royalty payments in said field which by contract are payable by applicant or other producers similarly situated at a fixed rate not dependent on the market value or proceeds of the gas produced.

As grounds for such application, applicant respectfully shows to the Commission:

1. Said Order No. 19514 in Cause CD No. 1054 was entered by the Commission on December 9, 1946, and provides that from and after January 1, 1947, no gas shall be produced from the Guymon-Hugoton Field at a price at the wellhead of less than 7c per Mcf measured

at a pressure of 14.65 pounds per square inch absolute. Said Order No. 26096 in Cause CD No. 3628 was entered by the Commission on July 29, 1952, and increases such minimum price effective from and after August 1, 1952, to 9.8262c per Mcf.

2. The Commission by its further Order No. 19702 entered February 4, 1947, in said Cause CD No. 1054, interpreted said Order No. 19514 to prohibit the production of gas from said field unless the "producer" realized therefrom the equivalent of the prescribed minimum price at the wellhead, and further found that applicant was at that time in compliance with said order because it as a producer was realizing the equivalent of the prescribed minimum price for the gas produced by it from said field.

3. Applicant during all of the time said Order No. 19514 was effective realized substantially the same amount for the gas produced by it as was being so realized at the time said Order No. 19702 was entered, and from and after the time said Order No. 26096 became effective has realized for all of the gas produced by it the equivalent of the minimum price therein prescribed.

4. Applicant for all of the time said Order No. 19514 and Order No. 26096 have been effective has paid its royalty owners, the State of Oklahoma and all others to whom applicant was, by contract or otherwise, obligated to make any payment by way of royalty, overriding royalty or taxes based on market value or proceeds of the gas produced by it from the Guymon-Hugoton Field at a rate per Mcf at the wellhead equal to or in excess of the minimum prices so prescribed thereby.

5. Cabot Carbon Company and The Texas Company, with whom applicant has contracts providing for the payment by applicant to said companies of overrid-

ing royalties in a fixed sum per Mcf of a designated percentage of the gas produced, as distinguished from the usual and typical royalty or overriding royalty measured by the market value or proceeds of sale thereof, are now claiming that said Order No. 19514 and Order No. 26096 were intended by the Commission and are to be interpreted to apply to and modify said contracts to the extent of requiring applicant, the producer, to pay said overriding royalties at the rates of payments per Mcf prsecribed by said Order No. 19514 and Order No. 26096 rather than at the fixed rates of payment prescribed and agreed upon by the parties in said contracts and are presently suing applicant for the differences between the amounts paid under the terms of said contracts and the amounts claimed to be due under said orders to November 1, 1952, in the case of the suit by Cabot Carbon Company and to the date on which the petition was last amended, namely, August 29, 1952, in the case of the suit by The Texas Company. Applicant has at all times fully accounted for and paid said overriding royalties at the rates agreed upon and prescribed in said contracts.

6. Applicant does not desire to be in violation of said orders either retroactively or prospectively and therefore desires an order of the Commission clarifying said orders as to whether or not they were intended by the Commission or are to be interpreted to apply to and modify the overriding royalty provisions of the aforesaid contracts as claimed by Cabot Carbon Company and The Texas Company and an order directing that applicant and other producers similarly situated shall not be required by reason of any order of the Commission to pay the owner of any such overriding royalty interest in the Guymon-Hugoton Field any sum in excess of that ex-

pressly required to be paid by the terms of the royalty contract.

7. The aforesaid contracts with Cabot Carbon Company and The Texas Company are lease purchase contracts under which applicant acquired from each of the respective companies a part of the gas leases from which applicant is producing gas in the Guymon-Hugoton Field. The overriding royalties so provided for therein are a part of the negotiated consideration payable by applicant for the leases acquired by it thereunder and is in addition to the usual and typical 1/8 royalty payable under the leases to the lessors thereof. Under neither contract is the amount of the overriding royalty determined or affected by the field price, market value or proceeds of sale of the gas produced. By the further terms and provisions thereof and of the leases, assignments and other instruments exchanged by the parties pursuant thereto, applicant became and is the lessee of the lands covered thereby with the exclusive right to explore, develop and operate the same for the production of gas, which, when produced, is the sole property of applicant, who has the exclusive possessory right thereto and the exclusive right to market, use or otherwise dispose thereof as it sees fit, subject only to the obligation to pay the royalties provided for in said contracts, leases and assignments, all without cost to either Cabot Carbon Company, The Texas Company or the lessors under said leases.

8. There is nothing in either said Order No. 19514 or Order No. 26096 that would indicate any intent or purpose on the part of the Commission to thereby regulate, amend or change in any way the contractual basis or rate of overriding payments by a producer or to ex-

ercise any authority or jurisdiction in such respect. As disclosed by the record of the proceedings and hearings pursuant to which said orders were entered, the only type of royalty contract therein considered was the usual and typical type in the field whereby the royalty is determined by the market value or proceeds of the gas produced. The protection or benefit which those other than the producer sought to obtain was that which would incidentally accrue to them under the express terms of their royalty contracts as the result of the regulation of the minimum price received by the producer. The regulation or modification of the agreed basis of overriding royalty payments in the field was not before or considered by the Commission.

9. An interpretation or application of said Order No. 19514 or Order No. 26096 or any other order which would require a producer to pay to the owner of a fixed payment overriding royalty interest a sum in excess of that expressly required to be paid by his contract would not (a) prevent or tend to prevent either physical or economic waste of natural gas; (b) protect or tend to protect the correlative rights of any person or persons owning any interest in the Guymon-Hugoton Field; or (c) in any way protect the interest of the public. On the contrary, such an interpretation and application of said orders (a) would cause or tend to cause both physical and economic waste of gas in that it would substantially increase the costs of the producer and thereby limit what the producer can afford to do to secure the greatest ultimate recovery of gas from its wells, shorten the economic and productive life thereof, and prevent the drilling of edge or marginal wells; (b) would take from the producer valuable contract rights it otherwise has and arbitrarily give to the owners of such overriding royalty in-

terests rights to which they are not entitled; and (c) because of the waste caused or tended to be caused, would be injurious to the interests of the public.

10. An interpretation or application of said Order No. 19514 or Order No. 26096 such as would require applicant, the producer, to pay to Cabot Carbon Company or The Texas Company sums in excess of those expressly required to be paid by their respective contracts, would serve no public purpose within the exercise of the police power of the state and would constitute a taking of private property without due process of law and an impairment of contract in violation of Sections 7 and 15 of Article II of the Oklahoma Constitution and Section 10 of Article I and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

WHEREFORE, applicant prays that this application be set for hearing and that notice thereof be given as by law required and that upon said hearing the Commission enter an order clarifying said Order No. 19514 and Order No. 26096 in respect to the interpretation and application of said orders to overriding royalty payments which by contract are payable by applicant or other producers similarly situated at a fixed rate not dependent upon market value or proceeds of the gas produced, and for an order ordering that a producer shall not be required by reason of any order of the Commission to pay the owner of any such overriding royalty interest in the Guymon-Hugoton Field any sum in excess of that expressly required to be paid by the terms of the overriding royalty contract, and for such other and appropriate action as may be proper in the premises.

/s/ Harry D. Turner
Harry D. Turner

/s/ R. M. Williams
R. M. Williams
/s/ Cecil C. Hamilton
Cecil C. Hamilton
/s/ Kenneth Heady
Kenneth Heady
Attorneys for Applicant
Phillips Petroleum Company.

Filed
May 24, 1954
Secretary
Corporation Commission
of Oklahoma

APPENDIX "B"

TITLE 52, SECTION 239, OKLAHOMA STATUTES 1951.

"§239. COMMON SOURCE OF SUPPLY—EXCESS GAS SUPPLY—APPORTIONMENT AND REGULATION TO PREVENT WASTE. Whenever the full production from any common source of supply of natural gas in this state is in excess of the market demand, then any person, firm or corporation, having the right to drill into and produce gas from any such common source of supply, may take therefrom only such proportion of the natural gas that may be marketed without waste, as the natural flow of the well or wells owned or controlled by any such person, firm or corporation bears to the total natural flow of such common source of supply having due regard to the acreage drained by each well, so as to prevent any such person, firm or corporation securing any unfair proportion of the gas therefrom; provided, that the Corporation Commission may by proper order, permit the taking of a

greater amount whenever it shall deem such taking reasonable or equitable. The said commission is authorized and directed to prescribe rules and regulations for the determination of the natural flow of any such well or wells, and to regulate the taking of natural gas from any or all such common sources of supply within the state, so as to prevent waste, protect the interests of the public, and of all those having a right to produce therefrom, and to prevent unreasonable discrimination in favor of any one such common source of supply as against another. Laws 1915, ch. 197, §4."

TITLE 52, SECTION 112, OKLAHOMA STATUTES 1951.

"§112. APPLICATION TO AMEND OR MODIFY ORDERS —HEARING—APPEAL. Any person affected by any Legislative or administrative order of the Commission shall have the right at any time to apply to the Commission to repeal, amend, modify, or supplement the same. Such application shall be in writing and shall be heard as expeditiously as possible after notice of the hearing thereon shall have been given in the manner provided by Section 14 of this Act. An appeal shall lie to the Supreme Court from any order made by the Commission in any such proceedings or from the refusal of the Commission to make any order petitioned for therein, in the same manner and within the same time in which other appeals are authorized to be taken by the provisions of this Act, and, on any such appeal, the Supreme Court may affirm the order of the Commission, or the Commission's action in refusing to make the order petitioned for, or may itself make the order which the Commission should have made, or remand the cause to the Commission with direc-

tions to make such order as the Supreme Court may determine should have been made. Laws 1933, ch. 131, p. 292, § 29."

TITLE 52, SECTION 241, OKLAHOMA STATUTES 1951.

"§241. ENFORCEMENT OF ACT — HEARINGS BEFORE CORPORATION COMMISSION. — Any person, firm or corporation, or the Attorney General, on behalf of the state may institute proceedings before the Corporation Commission, or apply for a hearing before said commission, upon any question relating to the enforcement of this act; and jurisdiction is hereby conferred upon said commission to hear and determine the same, said commission shall set a time and place when such hearing shall be had and give reasonable notice thereof to all persons or classes interested therein by publication in some newspaper or newspapers having general circulation in the state, and shall in addition thereto cause notice to be served in writing upon any person, firm or corporation, complained against in the manner now provided by law for serving summons in civil actions. In the exercise and enforcement of such jurisdiction said commission is authorized to summon witnesses, make ancillary orders, and use such mesne and final process including inspection and punishment as for contempt, analogous to proceedings under its control over public service corporations as now provided by law. Laws 1915, ch. 197, § 6."

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1954.

No. 274

PHILLIPS PETROLEUM COMPANY, A CORPORATION,
Petitioner,

vs.

CABOT CARBON COMPANY, A CORPORATION,
Respondent.

PETITIONER'S REPLY TO BRIEF OF RESPONDENT.

Under the guise of correcting "erroneous and misleading" statements of Petitioner, Respondent has misstated the facts in several respects. Except for two instances bearing directly upon the validity of Respondent's theory of recovery, we shall not take the time of the Court to point out the details of other misstatements.[1] Rather, it is believed that

1. At page 2 of its brief Respondent states:

"In paragraph 4 of the contract (R. 32) it was agreed that *Phillips would purchaes Cabot's share of the gas*, when produced, at a price of 4c per thousand cubic feet."

That is not true as will be seen from that paragraph as quoted by Respondent on the same page of its brief. It is true (and has been so stated by Petitioner (Pet., p. 7), and not "consistently erroneously alluded to indirectly" as asserted by Respondent) that the contract provided that Cabot should reserve an undivided interest in the natural gas underlying said lands or in any natural gas which may be produced therefrom, but it also provided that Phillips should "become the owner of the gas when produced" and should account to Cabot at a value of 4c per MCF for 1/4 of 7/8 of the gas produced. But the contract does *not* say, as Respondent says it does, that "Phillips would *purchase* Cabot's share of the gas, when produced, at a price of 4c per thousand cubic feet."

Respondent would have been more frank with the Court if it had said that *it construes the contract to mean* that Phillips would purchase

the Court will be best aided by our pointing up some of the basic issues which call for review by this Court of the decision below.

One of the fundamental questions presented is whether the Federal Courts are to be allowed to take over and administer the state conservation laws or whether that function is to remain with state administrative bodies. That question is squarely presented by the decision below holding that the Corporation Commission's minimum price orders mean one thing and the Corporation Commission's holding (Order No. 28884, dated July 16, 1954) that it intended no such thing and that as construed by the court below the minimum price orders would not serve either of their intended purposes—the prevention of waste and the

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FOOTNOTE 1—*Continued*:

Cabot's share of the gas. But such construction would be in the teeth of the Oklahoma law that oil and gas are not susceptible to ownership prior to production and that the payment of overriding royalties by the oil and gas lessee is not payment for the gas but is payment of the consideration for the lease under which the gas is produced. (Pet., pp. 43-45, 21)

At page 3 of its Brief, Respondent states:

> "Neither the contract nor any lease or assignment thereunder labels this interest [Cabots' interest reserved under paragraph 4 of the contract] 'overriding royalty'."

If this were true is would be of no consequence (Respondent concedes at a later point that labels are unimportant (Resp. Br., p. 19)), because it cannot be denied, and we do not understand is denied by Respondent, that it is in fact an overriding royalty under Oklahoma decisions. But Respondent's statement quoted above is only literally and *technically* true. At page 34 of the Record there appears a provision in the contract between Petitioner and Respondent for reassignment of leases by Petitioner to Respondent under certain circumstances, and it is provided that in case of such reassignment Respondent shall drill on such tract and

> "If such drilling results in a commercially productive well, Cabot shall pay to Phillips as the gas is sold *the same amount of royalties to which Cabot would have been entitled under paragraph 4 above had Phillips drilled the well.*" (Emphasis supplied.)

Thus the contract *does* "label" Cabot's reserved interest as a "royalty" and no one contends that it makes any difference whether it is an "overriding" royalty or a landowner's royalty.

Moreover, Respondent has in other documents (R. 45, 51, 55) including the letter asserting its claim upon which this suit was brought (R. 119) "labeled" its interest as "overriding royalty."

In addition both courts below expressly "labeled" Cabot's interest as an "overriding royalty." (R. 16, 124)

protection of correlative rights. (Appendix A to Petition, paragraph 5.)

Respondent seeks to avoid the controlling effect which this and other courts uniformly give to the interpretation of administrative orders by the body which made them (Pet., pp. 16-19) by the following contentions:

(*1*) Order No. 28884 of the Corporation Commission is not in the record but appears only in the appendix to the petition and should not therefore be considered (Resp. Br., p. 8).

(*2*) The rule of the decisions cited is inapposite because the meaning of these minimum price orders had previously been established by the Supreme Court of Oklahoma and by this Court (Resp. Br., pp. 9, 18).

(*3*) The minimum price orders are not ambiguous and are therefore not susceptible to the interpretation placed upon them by the Commission which made them (Resp. Br., p. 18) and that order No. 28884 amounts to a new order, retroactive in effect, and beyond the power of the Commission to make (Resp. Br., p. 9).

(*4*) Order No. 28884 of the Commission is an attempt to adjudicate contract rights between private parties and is beyond the power of the Commission (Resp. Br., p. 10).

(*5*) Order No. 28884 amounts to an attempt by the Commission to overrule the decisions of the District Court and the Court of Appeals that under the contracts Respondent owned 1/4 of 7/8 of the gas in the reservoir and as produced, which the Commission is without power to do (Resp. Br., pp. 10, 11).

(*6*) The Commission was without power to "repeal, amend, modify or supplement a previous order issued by it"

in the absence of a change of conditions, and that no change in conditions appears (Resp. Br., p. 11).

(7) Order No. 28884 is in conflict with the decisions of the Supreme Court of Oklahoma in the *Cities Service* case, 203 Okl. 35, 220 P. (2d) 279, and the *Natural Gas Pipe Line* case, 272 P. (2d) 425,[2] and with its previous orders (Resp. Br., p. 11).

A number of these contentions will be answered as a group. The contentions being answered will be indicated by numbers at the commencement of the discussion corresponding with the number of its contention as stated above.

(1) With respect to the order of the Corporation Commission of July 16, 1954, interpreting and applying its minimum price order to the factual situation here involved, Respondent says that the order (Appendix A to the Petition) and the application therefor are no part of the record and "We are aware of no decision which justifies their consideration" (Resp. Br., p. 8).

This Court takes judicial notice of the law of the states. This includes the Commission's order, just as it does the statutes of the state and decisions by the State Supreme Court.[3]

(2) (3) (7) The principal basis for these contentions is that under Oklahoma law Respondent was the owner of

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2. Now pending on appeal to this Court, Nos. 320, 321 and 322, October Term 1954.

3. Courts of the United States administering the laws of a state will take judicial notice of all statutes, laws and decisions which a court of such state would take judicial notice of. *Covington Drawbridge Co.* v. *Shepherd*, 20 How. 227; *Gerling* v. *B. & O. R. Co.*, 156 U. S. 173; *Hanley* v. *Donoghue*, 116 U. S. 1.

The order here involved is one of which the Oklahoma Supreme Court will take judicial notice. *Oils, Inc.*, v. *Corporation Commission* 165 Okl. 202, 25 P. (2d) 703; *Groendylse Transport, Inc.*, v. *State*, 208 Okl. 602, 258 P. (2d) 670.

See also *Owings* v. *Hull*, 9 Peters 607, 625.

1/4 of 7/8 of the gas in the reservoir, as the courts below held, and that Respondent sold and Petitioner purchased this gas as it was produced; that the Supreme Court of Oklahoma held in the *Cities Service* and in the *Natural Gas Pipe Line* cases that the minimum price order applied to all sales of gas in the field and that as so construed the order served the purpose of conservation of gas and was constitutionally valid.

The basic contention of Respondent with respect to its ownership of the gas in the reservoir is not well taken under the Oklahoma decisions (Pet., pp. 42-45). The Oklahoma rule is that landowners and oil and gas lessees own only the right to search for and reduce to possession the oil and gas underlying the land and that no one owns these minerals until they are reduced to possession. Upon conveying to Petitioner the oil and gas leases, Respondent parted with all rights to search for and reduce the gas to possession. Not only so, but the contract provided that Petitioner should "become the owner of the gas *when* produced" which was the earliest time that anyone could own the gas under Oklahoma law. Respondent's only right under the contracts was to be paid a sum of money calculated by applying 4c per Mcf to 1/4 of 7/8 of the gas produced by Petitioner. Although Respondent now implies (but does not say) that its interest was not an overriding royalty (Resp. Br., p. 3) the fact is that the contract between the parties called it a royalty (R. 34) and that Respondent called it an overriding royalty in division orders which it signed (R. 45, 51, 55) and in asserting the claim upon which this suit was brought (R. 119), and both the District Court and the Court of Appeals so labeled it in their decisions in this case (R. 16, 124). There can be no doubt that under Oklahoma law Respondent's interest is properly labeled "over-

riding royalty" and that the payments to be made by Petitioner are not payment for gas but are part of the consideration for the leases which it bought from Respondent (Pet., p. 21).

Aside from this, whether Respondent was the technical owner of 1/4 of 7/8 of the gas in the ground or whether technically a sale of gas from Respondent to Petitioner took place upon production of the gas by Phillips, it is undeniable that the factual situations before the Supreme Court of Oklahoma in the *Cities Service* and the *Natural Gas Pipe Line Company* cases were entirely different from the one here presented in that the Oklahoma court was dealing with sales of gas by the lessees, who were also the producers, to pipe line companies. The sellers of gas there were the ones who bore the expense of drilling for and producing the gas. The Oklahoma court did not have before it and did not consider a "sale" of gas (if it may be called a sale) by one who owned no part of the lease, had no control of the drilling or production, or the disposition to be made of the gas, and who bore no part of the expense of those operations. To say, therefore, that the minimum price orders were construed by the Oklahoma Supreme Court so as to apply to this factual situation, is to give to those decisions a scope far beyond any factual justification and far beyond any intent that can be derived from the language used. Court opinions are to be construed and applied in the light of the facts before the court (Pet., p. 26; *Armour & Co.* v. *Wantock,* 323 U. S. 126, 132-133). It would be particularly obnoxious to apply that decision to a factual situation so different from the facts before the court that the effect upon conservation would be the opposite to the effect of those decisions (Pet., pp. 27-29).

It follows that the contention that the Oklahoma Supreme Court has settled the meaning of the price orders so as to preclude the Commission from placing its own interpretation upon them as applied to the facts of this case is wholly untenable.

It is equally clear that the Commission was empowered to interpret and apply the price orders to a factual situation such as here presented and to declare that it was not its intent to require producers to pay to persons in the position of Respondent any sum in addition to what the contract required. This is true regardless of whether Respondent be deemed technically the owner of gas in the reservoir, as Respondent contends, or that it be deemed not the owner of gas in the reservoir, as Petitioner contends. In either event the purposes of conservation are served by requiring the producer who bears the expense of production to obtain a minimum price for gas and are not served, but conservation is impeded and correlative rights are not protected by requiring such producer to pay additional sums as royalty or otherwise (Pet., pp. 27-31).

That the orders are not only susceptible to the interpretation placed upon them by Order No. 28884, but cannot reasonably be construed any other way, is sufficiently shown in the petition for the writ, pp. 35-45.

(4) (6) The contention that the Commission was without power to enter the order No. 28884 because it was an attempt to adjudicate contract rights between private parties and because there was no change in conditions shown is entirely frivolous in view of the Oklahoma Supreme Court's decision in the *Natural Gas Pipe Line Company* case construing and applying the minimum price order (Pet., p. 14).

(5) Order No. 28884 is no more an attempt to overrule the federal court's decision than is the decision of a state Supreme Court construing a state statute differently from the interpretation of the statute by a federal court. In each instance the decision has no direct impact upon the decision reached by the federal court. Only that court or an appellate court can change that decision. But since the federal courts are bound to apply state law as interpreted by the state tribunals, it is the duty of the federal court that rendered the decision, or the appellate court upon review of that decision, to adjust the decision to conform to the state tribunal's interpretation whenever such decision is called to its attention before its jurisdiction is exhausted (Pet., p. 20).

So it is clear that no tenable reasons have been advanced by Respondent against the recognition and application of the interpretation by the Corporation Commission of its own orders. Failure to apply the Commission's interpretation of its own orders necessarily means that the federal courts have usurped the powers of the state commission to administer the conservation laws of the state.

Respondent's defense to the asserted unconstitutionality of the minimum price orders as construed and applied in this case is predicated upon the assumption, and upon the holding of the Court of Appeals, that Respondent was the owner of 1/4 of 7/8 of the gas in the reservoir and sold this gas to Phillips at the time of production for 4c per MCF. Other miscellaneous statements are made in the course of Respondent's argument based upon statements of facts unsupported by the record and which are wholly irrelevant to the issues.

We have pointed out in the Petition for Certiorari (pp. 42-45, 21) and in the discussion above that the Court of Appeals failed to follow the decisions of the Supreme Court of Oklahoma relating to the ownership of oil and gas in place and the nature and character of overriding royalty, such as Cabot's. We have further shown above that even though it be concluded that the Court of Appeals was right in holding that Cabot reserved an undivided interest in the gas in place and sold that gas to Phillips upon production, that was not the kind of sale and purchase which the Supreme Court of Oklahoma and this Court had for consideration in the *Cities Service* case, and which the Oklahoma court had for consideration in the *Natural Gas Pipe Line* case, and therefore that the decisions in those cases cannot properly be regarded as having held that the minimum price orders require a producer, such as Petitioner, to pay one in the position of Respondent (whatever label may be placed upon its interest) for the gas (*supra*, p. 6). It is even more certain that those decisions cannot be regarded as having established the constitutional validity of these orders as applied to this factual situation (Pet., pp. 24-27).

Aside from its contention that the decision of the Supreme Court of Oklahoma and the decision by this Court in the *Cities Service* case settled the constitutionality of these orders, Respondent rests its defense of constitutionality upon the bare assertion that Petitioner unsuccessfully contended in the *Cities Service* case that the orders did not prevent waste or protect correlative rights (Resp. Br., p. 25). An examination of the briefs filed in that case will disclose that Petitioner's contention there was that as applied to sales by a producer, such as Phillips, to a pipe line company, the evidence failed to show that there had been any waste in the Guymon-Hugoton Field or that the minimum

prices would prevent waste in the future. The Courts were not there considering, and Petitioner's argument was not addressed, and could not have been addressed under the record in that case, to a factual situation, such as the one here presented. Therefore, the failure of the Courts to hold under the record in that case that the minimum price orders had no relation to the prevention of waste or the protection of correlative rights is without significance in determining the constitutional validity of the orders as applied to the factual situation here presented.

Respondent does not respond to the merits of the argument made by Petitioner (Pet., pp. 27 to 31) that the orders as applied to the facts of this case do not prevent but rather accentuate waste and in no way protect correlative rights.

We shall not undertake to answer all of the miscellaneous irrelevant statements by Respondent, unsupported by record references. We do desire, however, to mention two assertions made by Respondent on page 23 of its brief, *i. e.*, "Petitioner also ignores the fact that its own enrichment under the Commission's orders far exceeds Cabot's. • • • On the sale by Phillips of its share of the gas produced from the leaseholds involved here alone, Phillips will receive $3.00 for every additional dollar it pays Cabot."

Petitioner in fact received nothing whatever by reason of the original 7c order under which Respondent has been adjudged by the Court beolw to be entitled to 3c per MCF in addition to the 4c provided by the contract. Petitioner was already receiving, or at least the Corporation Commission and the Courts so held, 7c for the gas which it produced.

The amount that Petitioner will receive by virtue of the 9.8262c order depends upon the price which it was receiving at the time the order was made and would have received in the future, which facts are not shown by the record. Respondent erroneously assumes that Petitioner will receive increases under these orders in direct propor-

tion to the increases received by Cabot, which definitely is not the fact. That would only be true if Petitioner had been receiving only 4c for its gas, and as has already been pointed out, the Commission and the Courts decided that Phillips was receiving at least 7c per MCF at the time the original order was made.

All of this, of course, is entirely irrelevant to the issues in this case. The point is that the Commission and the Courts have held that the public interest is served by requiring a producer of gas to receive a minimum price for that gas, whereas the Commission has held that conservation is not promoted and correlative rights are not protected, from which it follows that no public interest is served, by requiring a producer, such as Phillips, to pay additional sums to one, such as Cabot, who has no voice in the production and bears no part of the cost. It matters not therefore that the producer may profit, whereas the fixed price overriding royalty owner may not profit, by virtue of minimum price orders having judicial sanction as being in the public interest. *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, 187.

Respectfully submitted,

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No. 274

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

PHILLIPS PETROLEUM COMPANY,
a corporation,
Petitioner,

VERSUS

CABOT CARBON COMPANY,
a corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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September, 1954.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 5-8750

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No. 274

In the Supreme Court of the United States

OCTOBER TERM, 1954

PHILLIPS PETROLEUM COMPANY,
a corporation,
Petitioner,

VERSUS

CABOT CARBON COMPANY,
a corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

For convenience the respondent, Cabot Carbon Company, will be referred to herein as "Cabot"; the petitioner, Phillips Petroleum Company, will be often referred to as "Phillips" and the Corporation Commission of Oklahoma will be referred to as "Commission."

STATEMENT OF THE CASE

Petitioner's statement of the case is erroneous and misleading in several respects and for this reason we make a short statement of the material facts.

On March 10, 1944, Cabot and Phillips entered into a contract (R. 31) whereby Cabot agreed to assign certain designated oil and gas leases then owned by it to Phillips and to execute to Phillips leases on certain other lands in which Cabot owned all or part of the minerals.

In Paragraph 4 of the contract (R. 32) it was agreed that Cabot would reserve an undivided one-fourth of seven-eighths interest in the natural gas underlying said lands or in any natural gas which should be produced therefrom and that Phillips would purchase Cabot's share of the gas, when produced, at a price of 4¢ per thousand cubic feet.

The exact wording of Paragraph 4 of the contract which Phillips has failed to quote in its petition and has consistently erroneously alluded to indirectly, is as follows:

> "4. From the leasehold estates assigned and granted to Phillips, or any renewals thereof Cabot shall (in addition to the one-eighth royalty provided in the leases granted to Phillips on Oklahoma Producers Form 88) *reserve an undivided interest in the natural gas underlying said lands or in any natural gas which may be produced therefrom* which shall be free of development and operating costs and equal to one-fourth of seven-eights of all the gas produced. Phillips shall become the owner of the gas when produced and will account to Cabot for said one-fourth of seven-eighths of the gas produced at a value of four cents (4¢) per MCF. The volume of gas produced shall be determined on the basis of an assumed temperature of sixty degrees Fahrenheit and an absolute pressure of 16.4 pounds per square inch" (R. 32).[1]

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[1] Unless otherwise stated, emphasis in quoted material is ours.

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Neither the contract nor any lease or assignment thereunder labels this interest "overriding royalty."

As specifically pointed out in the opinions of the Court of Appeals and the District Court, such reservations were incorporated in all of the assignments, leases and other instruments executed by the parties.

On December 9, 1946, the Commission entered its 7¢ price fixing order No. 19514 (R. 60), effective as of January 1, 1947, which, in addition to comprehensive and elaborate findings, provided:

> "That no natural gas *shall be taken out* of the producing structures or formations in the Guymon-Hugoton field in Texas County, Oklahoma, at a price, at the wellhead, of less than 7¢ per thousand cubic feet of natural gas * * *" (R. 67).

At the same time the Commission entered Order No. 19515 (R. 68), which is largely a repetition of Order No. 19514 with the addition that it directs Cities Service Gas Company to take gas ratably from Peerless Oil & Gas Company.

On January 17, 1947, Phillips filed an application (R. 78) with the Commission to vacate Order No. 19514 and so much of Order No. 19515 as applied to Phillips. The Commission by Order No. 19702 of February 4, 1947, denied the application (R. 84, 87).

Cities Service Gas Company appealed to the Oklahoma Supreme Court from Orders Nos. 19514 and 19515. Phillips also appealed from these orders and from Order No. 19702 denying its application to vacate (R. 94). The cases were

consolidated in the Supreme Court of Oklahoma which affirmed the orders of the Commission and held that the Commission under its broad regulatory powers had authority to fix the minimum price of gas and that the orders did not violate either the Due Process and Equal Protection Clauses of the Federal and State Constitutions or the Commerce Clause of the Federal Constitution. *Cities Service Gas Company* v. *Peerless Oil and Gas Company*, 203 Okla. 35, 220 P.2d 279.

Phillips and Cities Service Gas Company appealed to this Court which, in *Cities Service Gas Company* v. *Peerless Oil and Gas Company*, 340 U.S. 179, and *Phillips Petroleum Company* v. *Oklahoma, et al.*, 340 U.S. 190, on December 11, 1950, affirmed the judgments of the Oklahoma Supreme Court.

On May 17, 1951, the Commission, upon the application of Panoma Corporation, entered Order No. 24745 (R. 91, 94, 95) wherein the Commission stated that it deemed it appropriate to find that when it entered its Order No. 19514

> "that it applied to all producers, purchasers and takers of gas from said field, *and that no sales or purchases of natural gas* would be thereafter permitted in the Guymon-Hugoton field at a price of less than 7¢ per thousand cubic feet, * * * so that *the owners of the gas within said reservoir, being the lessees and lessors, and other persons owning an interest in the gas in place,* should at all times from and after the issuance of said order, receive from the delivery of their gas, as owners and producers thereof, not less than the minimum price fixed by the Commission" (R. 91-95).

Natural Gas Pipe Line Company of America appealed to the Supreme Court of Oklahoma from Order No. 24745, which Court affirmed the order on September 15, 1953. *Natural Gas Pipe Line Company of America* v. *Panoma Corporation, et al.*, 271 P.2d 354 (not officially reported).

On July 29, 1952, the Commission, pursuant to the application of certain mineral owners in Texas County, Oklahoma, entered Order No. 26096 (R. 96) increasing the price of gas in the Guymon-Hugoton field from 7¢ to 9.8262¢ per thousand cubic feet (R. 100).

From this last order appeals were taken to the Supreme Court of Oklahoma which affirmed the order on April 27, 1954. *Natural Gas Pipe Line Company of America* v. *Corporation Commission of Oklahoma*, 272 P.2d 425 (not officially reported).

On November 28, 1952, Cabot instituted this action against Phillips in the United States District Court for the Western District of Oklahoma to recover a money judgment for the difference between the minimum prices fixed by the Commission for gas sold by Cabot to Phillips and the 4¢ price specified in the contract.

At the trial of this action Phillips stipulated that it made no contention herein that Order No. 26096 was invalid, but called attention to the fact that appeals to the Supreme Court of Oklahoma were pending by others than the parties to this suit. The parties referred to were Natural Gas Pipe Line Company of America, Michigan-Wisconsin Pipe Line Company and Panhandle Eastern Pipe Line Company. The three appeals were consolidated in

the Supreme Court. Phillips, a defendant in error in each case, defended and urged the affirmance of the order. *Natural Gas Pipe Line Company of America, et al.* v. *Corporation Commission, et al., supra.* The District Court rendered judgment on June 30, 1953 (R. 13-17) in favor of Cabot for the full amount of its claim and made findings of fact and conclusions of law (R. 14-17) and filed a written opinion (R. 12), 114 F. Supp. 953, 956. With reference to the contract involved herein the Court said:

> "It is apparent from the wording of the original contract and the leases and assignments executed in pursuance thereof that the parties intended that Cabot would retain title to its reserved undivided interest in the gas until it had been produced, and that Phillips was to acquire title and ownership only after production, when the gas could be measured and Cabot paid therefor. Cabot and Phillips were joint owners of the leasehold estate. Phillips contracted to produce the gas for both and when produced to purchase Cabot's share of the gas. It follows that Cabot was a joint producer and seller, and Phillips, the operator, was a joint producer and purchaser at the wellhead. The contract price is, therefore, superseded by the price fixing orders of the Corporation Commission."

On appeal the Court of Appeals affirmed the judgment of the District Court and in its opinion with reference to the contract (210 F.2d 841, 843) stated:

> "The contract between Phillips and Cabot recognizes a right in Cabot to an interest in the gas in place. In the contracts and leases the parties treated Cabot as the owner of the gas. The contract provided that Cabot would reserve an undivided interest in the natural gas underlying the lands or any natural gas which would

be produced therefrom. In the assignment of the leases which Cabot held it reserved ' "unto itself and its successors and assigns an undivided interest in the natural gas underlying the lands covered by this assignment and *produced therefrom* equal to one-fourth (1/4) of seven eighths (7/8) of all gas *produced from said lands* * * *." ' All the conveyances between the parties recognized such interest in the gas in place and in the production thereof. Such provisions are wholly inconsistent with the premise that Phillips became the owner of all the gas at the instance of production and that Cabot had no interest therein. The provision that ' "Phillips shall become the owner of the gas when produced" ' must be considered in context with all the rest of the provisions of the contract and the various assignments between the parties. It was no doubt inserted to make sure that Phillips should have the right to all the production from these leases including its interest therein, as well as the interest of Cabot, upon payment therefor. When so considered, the practical effect thereof was to give Phillips the right to receive Cabot's interest in the production by paying therefor the contract price of 4¢."[2]

THE PETITION FAILS TO STATE ANY GROUND FOR CERTIORARI

The petition for certiorari does not set forth any of the grounds in Rule 19 of Part V of the Revised Rules of this Court effective July 1, 1954, in that

(a) The decision of the Court of Appeals is not in conflict with the decision of any other court of appeals on the same matter;

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[2] Emphasis supplied by Court of Appeals.

The Court of Appeals did not decide:

(b) An important state question in a way in conflict with applicable state law;

(c) An important question of federal law which has not been settled by this Court;

(d) A federal question in conflict with applicable decisions of this Court;

(e) The Court of Appeals has not so far departed from the accepted and usual course of judicial proceedings or sanctioned such departure by a lower court as to call for an exercise of this Court's power of supervision.

ANSWER TO PETITIONER'S ALLEGED REASONS FOR GRANTING THE WRIT

I.

The first reason alleged by petitioner for granting the writ is that the Court of Appeals' decision is opposed to Order No. 28884 of the Commission made July 16, 1954, and that said order is conclusive upon the federal courts as to the meaning and application of the price fixing orders.

The application of Phillips and the order of the Commission referred to appear only in the appendix to Phillips' petition for the writ and are no part of the record in this case. We are aware of no decision which justifies their consideration. Should we be mistaken, however, and if it is proper for Phillips to bring these extraneous matters to the attention of this Court, we desire to state that the order has been appealed to the State Supreme Court and to

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show that it is invalid and of no force and effect for the following reasons:

(a) On May 24, 1954, after the judgment of the Court of Appeals had become final and after Phillips had obtained an extension of time within which to apply to this Court for a writ of certiorari, Phillips filed with the Corporation Commission an application for an order construing the price fixing orders. This, strangely enough, was more than eight years after the entry on December 6, 1946, of the 7¢ order (No. 19514) which had been superseded by the 9.8262¢ order (No. 26096) effective August 1, 1952.

It is obvious that Phillips sought and the Commission granted a retroactive order under the guise of construing the price fixing orders, but Phillips' real purpose, induced by desperate hope, was that it might by making use of such an order persuade this Court to grant the writ.

The cases cited by Phillips under this heading are inapposite since the meaning of the original price fixing orders had already been established by the Oklahoma Supreme Court and by this Court.

What the Commission seeks to do in its July, 1954, order is to overrule and nullify the constructions made of the original order by the Supreme Court of Oklahoma and by this Court, turn the clock back and make the new order effective as if it had been entered in *December, 1946*. The Commission was wholly without power to enter a new order modifying and changing its earlier orders and give them retroactive effect. *Arizona Grocery Co.* v. *The Atchi-*

son, Topeka and Santa Fe Railway Co. et al., 284 U.S. 370, 389.

The Commission in making the order has actually attempted to adjudicate contract rights between private parties, which it has no jurisdiction, power or authority to do. The Supreme Court of Oklahoma specifically held in *Southwestern Light and Power Co.* v. *Elk City*, 188 Okla. 540, 111 P.2d 820, that the Corporation Commission of Oklahoma is without jurisdiction or power to enter or enforce a judgment or order adjudicating contractual rights of the parties. Other cases to the same effect by the Supreme Court of Oklahoma are:

—*The Atchison, Topeka and Santa Fe Ry. Co.* v. *Corporation Commission*, 68 Okla. 1, 170 Pac. 1156;

Smith v. *Corporation Commission*, 101 Okla. 254, 225 Pac. 708;

Chicago, Rock Island and Pacific Ry. Co. v. *State*, 158 Okla. 57, 12 P.2d 494;

St. Louis-San Francisco Railway Co. v. *State*, 268 P.2d 845 (not officially reported).

Both the District Court and the Court of Appeals in construing the contracts between Phillips and Cabot, held that Cabot owned one-fourth of seven-eighths of the gas in the reservoir, and as produced, and that Phillips purchased the same pursuant to the terms of the contract.

Under the authorities above cited, the Commission did not by Order No. 28884, entered on July 16, 1954, have

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any jurisdiction, power or authority to overrule or change such adjudications.

(b) The application for the order, and the order itself, fail to show any change in conditions from what they were at the time the price fixing orders were made. Therefore, the Commission was without authority to repeal, amend, modify or supplement a previous order issued by it. Title 52, Section 112, O.S. 1951, is so construed by the Supreme Court of Oklahoma in *Carter Oil Company* v. *State et al.*, 205 Okla. 374, 238 P.2d 300, and *Wood Oil Co.* v. *Corporation Commission,* 205 Okla. 534, 239 P.2d 1021. In these opinions the Oklahoma Supreme Court held that the Commission was without authority to review and modify a former order that had become final upon the alleged ground that said order was ill-advised, inequitable or otherwise erroneous. Prior to July 16, 1954, appeals from the price fixing orders had been taken to the Supreme Court of Oklahoma in which the orders were reviewed and construed. *Cities Service Gas Co.* v. *Peerless Oil and Gas Co.*, 203 Okla. 35, 220 P.2d 279; *Natural Gas Pipe Line Company of America* v. *Corporation Commission of Oklahoma,* 272 P.2d 425. This Court also construed and applied the 7¢ order in cases heretofore cited.

(c) The Commission's Order No. 28884 of July 16, 1954, is in direct conflict with the above decisions and with its own previous orders. These decisions and orders clearly and unequivocally stated that the price fixing orders applied to all gas in the Guymon-Hugoton pool and to all producers, purchasers and takers of such gas and that the Commission in making the orders and the Supreme Court in

construing and sustaining them was primarily concerned with the conservation of gas, the protection of correlative rights and the interest of royalty owners and every person having an interest in the gas.

In the original price fixing order, No. 19514 (R. 60) the Commission ordered:

> *"that no natural gas shall be taken out of the producing structures or formations in the Guymon-Hugoton field * * *"*

for less than 7¢ per thousand cubic feet at the wellhead.

In Paragraph 4 of the Findings in Order No. 19702 (R. 84) denying Phillips' application to vacate or modify, the Commission stated that the order applied

> *"to all producers, purchasers and takers of gas in the field, * * *"*

and that Phillips Petroleum Company was a taker of natural gas in the field.

And in Paragraph 6 of said Findings, the Commission stated in substance that there would be discrimination if it did not fix a uniform price for the field and that the state's natural resources would be dissipated and wasted

> "all to the detriment of the producers, royalty owners and School Land Commission of the State of Oklahoma * * *."

In its opinion of January 17, 1950, in the consolidated appeal of Cities Service and Phillips from the 7¢ order heretofore cited, the Oklahoma Supreme Court made

numerous references to the fact that the 7¢ order applied to all gas and that it was intended to and did have for its purpose the protection of royalty and other owners. Pertinent thereto the Court said, at pages 39, 42 and 43:

> "Obviously, the protection of the interest of *all owners of the gas* is the intent of the statute and such is the standard of guidance to the Corporation Commission acting thereunder.
>
> * * * * * * * * *
>
> "Reference to protection of the interest of all those having a right to produce gas from a common source of supply directs attention to the owners of the land overlying the gas and such interests as they have conveyed.
>
> * * * * * * * * *
>
> "Under either of such circumstances prices might be so reduced that *landowners or royalty holders or particular leaseholders* would have their interests in the gas exhausted, dissipated and taken, without having received any reasonable compensation, and each suffer waste of a valuable reversion."

The Commission, in its Order No. 24745 (R. 91), as heretofore stated, specifically found that the order applied to all producers, purchasers and takers of gas from the field and that no sales or purchases of natural gas would thereafter be permitted at a price less than 7¢ per thousand cubic feet, and that the purpose of the order was to insure that owners of the gas in the reservoir, such as lessees, lessors and other persons having an interest in the gas in place would receive such price.

In Order No. 26096 (R. 96-101) fixing the price of gas at 9.8262¢, the Commission reaffirmed the findings and purposes of the 7¢ order.

On appeal in the *Panoma* case, *supra*, the Supreme Court in Paragraph 3 of the syllabus (the syllabus being the law of the case in Oklahoma) said:

> "When the Corporation Commission by valid order fixes the minimum wellhead price which must be paid for natural gas taken from a designated gas field or gas pool, that order supersedes any existing contract by which a purchaser is taking natural gas from such gas field or gas pool at a lesser price; and from and after the effective date of such order *such purchaser owes a legal duty to pay for all gas taken*, as much as the minimum price fixed by such order."

In the opinion the Court stated that:

> "* * * *no one* could legally take natural gas from that field at a price less than 7¢ at the wellhead."

In this opinion the Supreme Court of Oklahoma definitely held that a purchaser of gas violated the price order if it purchased gas at less than 7¢ per thousand cubic feet at the wellhead, even though its contract provided for a lesser price. Likewise, in its recent decision in the case of *Natural Gas Pipe Line Company of America* v. *Corporation Commission et al., supra*, affirming the order of the Corporation Commission, the Supreme Court of Oklahoma reaffirmed its previous decisions in cases involving the 7¢ price fixing order.

In the *Phillips'* case, *supra*, this Court said:

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"Appellant does not argue that the orders violate the Commerce Clause. In other respects, the appeal presents only minor variations of the issues raised by Cities Service. Phillips argues that it is not a purchaser but merely a producer; that unlike the situation in Cities Service, the order as applied to it lacks any connection with correlative rights, the interest of the public, monopolistic practices or discrimination. *The distinction is without a difference; the connection between realized price and conservation applies to all production in the field, whether owners purchase from others or not, and whether they own pipe lines or not. In a field which constitutes a common reservoir of gas, the Commission must be able to regulate the operations of all producers or there is little point in regulating any.*"

Phillips argues, and induced the Commission to hold in its recent order, that in entering the price orders

"the Commission contemplated and intended that the landowners, usual and typical royalty owners, and other persons whose royalty, overriding royalty or other interest in the gas is, by contract, measured by or dependent upon the market value or proceeds of sale thereof by the producer, would under and as a consequence of the terms of their contracts be entitled to payment based upon the minimum price the producer is so required to realize * * *."

The effect of this is that owners of the minerals and royalty owners having such contracts would be affected or benefited by the price orders and a large number of Phillips' lessors would be excluded as Phillips does not have such contracts with them. We must not be misled by Phillips' statement on page 21 of its petition, to-wit:

"It should be borne in mind that most overriding royalties, as well as landowners' royalties, provide for payment on the basis of proceeds of sale by the lessee or the market value of the gas or oil. Such royalties were 'typical' in the Hugoton Field (see Plaintiff's Exhibit 44, R. 113, and Stipulation, R. 26). Such was the type of royalty owners mentioned in the Commission's findings and in the Oklahoma Supreme Court opinion in the *Cities Service* case, 220 Pac. 279, 287."

Phillips again fails to state a material fact in the record. It is true that the gas leases referred to by it did contain such provisions when executed, but these leases were thereafter definitely and materially, in many instances, amended by the gas royalty agreements entered into by Phillips with many lessor royalty owners (R. 50 and 30).

These royalty agreements in specific terms superseded and modified the lease provisions. In lieu of the lease clauses providing for one-eighth of the market value or proceeds of sale, they substituted a provision calling for a minimum payment to lessors of 4¢ per thousand cubic feet for sweet gas and 3½¢ for sour gas, with a further provision that such minimum should be increased if the weighted average price of the gas sold by Phillips in one Oklahoma and two Texas counties should exceed such minimum price (R. 50).

Order No. 28884 would make it possible for these royalty agreements to defeat one of the purposes of the price orders and one of the grounds upon which they were justified and approved by the courts. This would result in gross and unfair discrimination since the effect of the

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price order would then vary with the terms of different leases and other contracts. By ingenious contracts, lessee-producers could take large quantities of gas from some at much less than the minimum price fixed by the orders while paying such minimum price to others. Such discrimination would tend to destroy correlative rights and the conservation of gas, the basic principles of the orders.

(d) The Commission's price orders are legislative orders, having the force of law analogous to an act of the Legislature. *Arizona Grocery Co.* v. *The Atchison, Topeka and Santa Fe Railway Co., supra.*

In the case of *Cities Service Gas Co.* v. *Peerless Oil and Gas Co., supra,* the Supreme Court of Oklahoma said:

> "The orders are legislative in character and subject in a large measure to the rules and principles by which the validity of statutes are determined."

It is a judicial function within the jurisdiction of the Oklahoma Supreme Court to construe the statutes of the state and the legislative orders of the Corporation Commission, such as the price orders herein involved, for the purpose of determining their meaning and application. When so interpreted and construed by the highest court of the state, such construction and interpretation is binding upon all, and the Commission is powerless to give its price orders a different interpretation or application from that of the highest judicial authority in the state. Phillips cites at page 16 of its petition the case of *Columbian Fuel Corp.* v. *Panhandle Eastern Pipe Line Co.*, 271 P.2d 773, by the Supreme Court of Kansas, in support of its contention that

the order of July 16, 1954, is conclusive upon federal courts as to the meaning and application of its previous price fixing orders, and seems to rely heavily on the statement therein that an administrative body's interpretation of its own rules, orders or regulations, in case of ambiguity, is entitled to great weight. In view of what has already been said, this case could have no application for the reason that there is no ambiguity in the orders and the Supreme Court of Oklahoma, in the case of *Cities Service Gas Co.* v. *Peerless Oil and Gas Co., supra*, so found, although Cities Service and Phillips contended to the contrary. Moreover, in the case relied upon by Phillips, and in other cases cited, there had not been, as in the present case, prior judicial interpretation and construction of the language of the administrative orders.

In *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, cited by Phillips, there had apparently been no judicial interpretation of an administrative regulation. The federal courts in construing a state statute accept the controlling decisions of the highest court of the state and only give weight to administrative interpretations when there have been no judicial interpretations by such court.

II.

Phillips' asserted second reason for granting the writ is based upon its claim that the minimum price orders as applied and construed by the Court of Appeals constitute a taking of private property and an impairment of private contracts in violation of the Due Process and Contract Impairment Clauses of the Federal Constitution. Petitioner

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states that the Cabot-Phillips contract provides for what Phillips labels "an overriding royalty payment." There is no such term used in this contract. Labels are not important. Both the trial court and the Court of Appeals found that under the plain language of the contract Cabot was the owner of one-fourth of seven-eighths of the gas and that Phillips purchased the same as produced. Therefore, it was a simple purchase and sale. The price fixing orders as construed by the Commission [Orders No. 19702 (R. 84-87) and No. 24745 (R. 91)] and the Supreme Court of Oklahoma applied to all sales and purchases of gas in the Guymon-Hugoton field. *Cities Service Gas Co.* v. *Peerless Oil and Gas Co.*, 203 Okla. 35, 220 P.2d 279; *Natural Gas Pipe Line Company of America* v. *Panoma Corporation et al.*, 271 P.2d 354; *Natural Gas Pipe Line Company of America* v. *Corporation Commission of Oklahoma*, 272 P.2d 425.

Petitioner makes the claim that the one-fourth of seven-eighths of the gas reserved by Cabot was a part of the consideration that Phillips paid for the leases. This is an incorrect statement. Phillips overlooks the fact that Cabot was the lessee when the contract was executed and that as such was the owner of the underlying gas—such gas was its property and it could deal with it like any other property. By the terms of the contract it transferred a three-fourths interest therein to Phillips and Phillips never at any time became the owner of the other quarter interest that was retained by Cabot until after the gas was produced. Obviously, Phillips could not give Cabot, as a consideration, something Phillips never had. Even if it

were a consideration, it would be immaterial. *City of Durant et al.* v. *Consumers' Light & Power Co.*, 71 Okla. 282, 177 Pac. 361.

Phillips has several times mentioned in its petition that the Commission in Order No. 19702 found that the applicant was at that time in compliance with Order No. 19514 fixing the minimum price for gas in the field at 7¢ per thousand cubic feet, but has failed to call to the attention of this Court the subsequent order of the Commission made in the *Panoma* case (R. 91-95) wherein the Commission explained the circumstances under which the statement was made and completely rejected the inference of compliance to be drawn from its order denying Phillips' application to vacate.

Moreover, Phillips did not accept the Commission's statement of compliance in its Order No. 19702, but in fact persistently urged in both the Supreme Court of Oklahoma and in this Court that the statement was unsound.

The record (R. 78, 80) also discloses that at the time Order No. 19702 was entered Phillips was under contract with Panhandle Eastern Pipe Line Company to sell it gas from the Guymon-Hugoton field at 4¢ per thousand cubic feet and the Commission, apparently without any investigation of the situation, assumed that the gross proceeds of the by-products extracted from said gas by Phillips should be added to the 4¢ contract price paid by Panhandle Eastern in determining whether the 7¢ was realized and the order thereby complied with.

That question constituted the material issue in the Panoma case. The pipeline company purchaser from Panoma urged that the Commission was bound by its statement (unsupported by the record) in Order No. 19702 denying Phillips' motion to vacate or modify the 7¢ price order and that the Commission should include the proceeds of the by-products extracted from the gas in determining whether the price realized was as much as the minimum price fixed by the 7¢ order. The Commission held that the proceeds of the by-products were not to be considered, as the cost of such extraction was substantially equal to the amount realized from the by-products. Later in the pipeline cases the Commission in Order No. 26096 adopted a formula to this effect and on appeal the formula was held to be reasonable and valid by the Oklahoma Supreme Court. *Natural Gas Pipe Line Company of America* v. *Corporation Commission of Oklahoma, supra.*

In the proceedings before the Commission resulting in the 9.8262¢ order Phillips again strenuously urged that the proceeds from the by-products should not be considered, while the pipeline companies, as above stated, insisted the proceeds should be included. Since the pipeline companies urged that what was said by the Commission in Order No. 19702 with reference to Phillips' compliance was binding in their cases and should be adhered to, the Commission rejected the contention (Paragraphs 10 and 11, Order No. 24745, R. 94-95) as did the Oklahoma Supreme Court in the *Panoma* case.

In view of this uncontradicted record, it does seem that petitioner has taken an untenable position.

Throughout its petition Phillips has repeatedly drawn inferences and conclusions and set forth imaginary fact situations wholly unsubstantiated by the record. It gives very slight, if any, consideration to the adjudications of the courts by which the issues in this case have been considered. Among these matters is the persistency with which Phillips implies it was not a purchaser of gas at the time the 7¢ order was made. During all that time it was purchasing gas from Cabot and others, and at the time and before the making of the 9.8262¢ order it was purchasing large quantities of gas in the Guymon-Hugoton field.

In the case of *Natural Gas Pipe Line Company et al. v. Corporation Commission et al., supra,* the Supreme Court of Oklahoma, in referring to the evidence offered by Phillips before the Commission, stated that:

> "Phillips has contracts with certain other producers by which it purchases gas at their wellheads, which gas it gathers, processes and sells in the same manner as the gas from its own wells and leases; that the production from its own leases is 14% of the total production of the field and the gas it purchases is 4.4% of the field total, making a total of gas which it produces or purchases of 18.4% of the field total; * * *."

Phillips asserts (page 22 of its petition) that the effect of the judgment of the Court of Appeals is to require Phillips to pay a huge sum of money to Cabot for Cabot's own private enrichment, in disregard of the contract. This contention was disposed of by this Court in the *Cities Service* case, *supra,* by the statement that a group of private

producers and royalty owners deriving substantial gain from the regulations does not contradict the established connection between the orders and a statewide interest in conservation. Petitioner also ignores the fact that its own enrichment under the Commission's orders far exceeds Cabot's.

Phillips, among others, urged in the Supreme Court of Oklahoma that the 9.8262¢ price order is valid and that it compels the Panhandle Eastern to pay Phillips the price fixed therein. This claim was sustained by the Supreme Court of Oklahoma in *Natural Gas Pipe Line Company of America* v. *Corporation Commission, supra.* On the sale by Phillips of its share of the gas produced from the leaseholds involved herein alone, Phillips will receive $3.00 for every additional dollar it pays Cabot.

This Court disposed of substantially the same claim with respect to the Due Process Clause of the Federal Constitution adversely to petitioner's contention in the cases of *Cities Service Gas Co.* v. *Peerless Oil and Gas Co., supra,* and *Phillips Petroleum Company* v. *State et al., supra.*

The orders as applied to the contract herein involved also do not violate the Contract Impairment Clauses for it is well settled by the decisions of this Court that private contracts are subject to change by the exercise of the police power of the state:

—*Patterson* v. *Stanolind Oil & Gas Company,* 305 U.S. 376;

Union Dry Goods Company v. *Georgia Public Service Corporation,* 248 U.S. 372, 376;

Hudson County Water Co. v. *McCarter*, 209 U.S. 349, 357;

Atlantic Coast Line R. R. Co. v. *Goldsboro*, 232 U.S. 548, 558;

Louisville & Nashville Railroad Co. v. *Mottley*, 219 U.S. 467, 482;

Stephenson v. *Binford*, 287 U.S. 251, 276;

Armour Packing Company v. *United States*, 209 U.S. 56, 82;

Midland Realty Company v. *Kansas City Power and Light Company*, 300 U.S. 109;

United States v. *B. & O. R. Co.*, 333 U.S. 169, 175;

Philadelphia B. & W. R. Co. v. *Schubert*, 224 U.S. 603, 613-614;

Henderson Co. v. *Thompson*, 300 U.S. 258;

Sproles v. *Binford*, 286 U.S. 374, 390;

Producers Transportation Co. v. *Railroad Commission*, 251 U.S. 228;

State of Oklahoma ex rel. v. *Oklahoma Natural Gas Corp.* (10 C.C.A.), 89 F.2d 416;

City of Tulsa v. *Oklahoma Natural Gas Co.*, 4 F.2d 399, appeal dismissed 269 U.S. 527.

The same principle has been applied by the Supreme Court of Oklahoma in numerous cases:

—*Cities Service Gas Company* v. *Peerless Oil & Gas Company, supra;*

Natural Gas Pipe Line Company of America v. *Panoma Corporation, supra;*

Natural Gas Pipe Line Company of America v. *Corporation Commission of Oklahoma, supra;*

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State ex rel. Roth v. *Waterfield*, 167 Okla. 209, 29 P.2d 24;

Southern Oil Corporation v. *Yale Natural Gas Co.*, 89 Okla. 121, 214 Pac. 131, affirmed in 266 U.S. 583;

Consumers Gas Co. v. *Corporation Commission*, 95 Okla. 57, 219 Pac. 126;

Eagle-Picher Lead Co. v. *Henryetta Gas Co.*, 112 Okla. 65, 239 Pac. 890;

American Indian Oil & Gas Co. v. *George F. Collins & Co.*, 157 Okla. 49, 9 P.2d 438;

City of Durant et al. v. *Consumers' Light & Power Co.*, 71 Okla. 282, 177 Pac. 361.

Petitioner's contention that the Commission's orders cannot be sustained on the grounds of waste prevention or correlative rights protection is wholly without merit. It unsuccessfully made this same contention as to the 7¢ price order in the Supreme Court of Oklahoma in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, *supra*, and in this Court in *Phillips Petroleum Company* v. *State*, *supra*.

III.

Phillips' third asserted reason for granting the writ is that the constitutional questions here presented by it could have and should have been avoided by the Court of Appeals. According to petitioner's own argument, the only way the Court of Appeals could have applied the orders in a way to avoid the constitutional questions here asserted by petitioner would have been for it to have decided the case in petitioner's favor. The Court of Appeals construed

the orders in accordance with the construction of the Supreme Court of Oklahoma and the decisions of this Court as applying to all sales and purchases of gas and applied this ruling principle to the facts of this case. The governing legal principles having been theretofore authoritatively decided, there was no occasion for the Court of Appeals to delay its decision.

Petitioner further contends that the Court of Appeals should have stayed further proceedings in this case pending an interpretation of the minimum price orders by the State Supreme Court or by the Commission. There was no occasion whatever for the Court of Appeals to stay further proceedings since the Supreme Court of Oklahoma had already judicially interpreted and construed the orders. Moreover, during the entire course of the present litigation between Cabot and Phillips there was no suggestion made by petitioner that the proceedings be stayed until the filing of its petition for rehearing after the Court of Appeals had rendered its decision, notwithstanding Phillips was thoroughly familiar with all of the pending cases cited in its petition for rehearing. In fact it was a party to all of these pending cases except the case of *Panoma Corporation* v. *The Texas Company*. As heretofore stated, these cases have since been decided by the Supreme Court of Oklahoma, in which it adhered to its former decisions in construing and applying the price fixing orders.

IV.

Phillips' fourth asserted reason for granting the writ is that the Court of Appeals misinterpreted and misapplied

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the minimum price orders and violated settled state law in respect to ownership of gas in place. It asserts under subdivision (a) that the Court of Appeals' interpretation is in conflict with the language of the orders, with their basic purpose, and with the findings of the Commission.

Petitioner admits that this claim is one with which this Court would not ordinarily concern itself, citing *Huddleston* v. *Dwyer*, 322 U.S. 232, 237, but contends that the Court of Appeals' interpretation and application of the order has presented a serious constitutional question and for that reason it should have declined to interpret the orders until the state tribunals had interpreted them.

The above contentions are wholly without substance or merit for the reasons:

(1) At the time of the rendition of the judgment the Court of Appeals correctly applied the law of ownership of gas as declared by the Supreme Court of Oklahoma. *Cities Service Gas Co.* v. *Peerless Oil & Gas Co., supra,* and *Natural Gas Pipe Line Company of America* v. *Panoma Corporation, supra.* Since that time the State Supreme Court has not changed its former rulings, but has reaffirmed and applied them. *Natural Gas Pipe Line Company of America* v. *Corporation Commission, supra.*

(2) The judgment of the Court of Appeals does not present a serious constitutional question for the reasons hereinabove stated.

(3) As we shall hereafter show, petitioner's argument under subdivision (c) is also without substance as the Court of Appeals correctly decided the question of the

ownership of gas in place by application of the law of Oklahoma as declared by statute and the decisions of its Supreme Court.

In further support of its contentions, petitioner proceeds on pages 36 to 40, inclusive, to discuss alleged findings and purposes of the Commission's orders. We consider all such argument irrelevant at this late day in view of the fact that these questions have all been settled adversely to petitioner's contention by this Court and by the Supreme Court of Oklahoma in the cases above cited.

In the light of the decisions of this Court, it seems unnecessary to refer further to the detailed findings in the Commission's orders or to extensively quote from the decisions of the Supreme Court of Oklahoma. We deem it appropriate, however, to call this Court's attention to its own decision in the *Phillips'* case.

For the same reasons above given, there is no merit in petitioner's contention that the price orders as construed and applied by the Court of Appeals exceed the statutory powers of the Commission. The statutory power to make such orders under the conservation laws has been established by the Supreme Court of Oklahoma in the cases heretofore cited as being a proper exercise of the police power of the state and that all contracts are subject thereto. *Natural Gas Pipe Line Co.* v. *Panoma Corporation, supra.* Therefore, the Court of Appeals was eminently right in following the decisions of the State Supreme Court and applying the principles therein announced to the contract involved herein. This Court in the *Cities Service* case said:

"Like any other regulation, a price-fixing order is lawful if substantially related to a legitimate end sought to be attained. *Nebbia* v. *New York*, 291 U.S. 502 (1934) and cases therein cited. In the proceedings before the Commission in this case, there was ample evidence to sustain its finding that existing low field prices were resulting in economic waste and conductive to physical waste. That is a sufficient basis for the orders issued."

THE COURT OF APPEALS APPLIED THE LAW OF OKLAHOMA AS TO THE OWNERSHIP OF GAS IN PLACE

Petitioner, under sub-section (c) of its fourth alleged reason for granting the writ, contends in effect that the Court of Appeals did not apply the law of Oklahoma in respect to the ownership of gas in place. There is no basis whatever for this contention.

Whatever may have been the rule of the State of Oklahoma decisions prior thereto, Paragraph 231, Title 52, O.S.A., enacted in 1913, provided that:

"All natural gas under the surface of any land in this state is hereby declared to be and is the property of the owners, or gas lessees of the surface under which gas is located in its original state."

In Chapter 26, page 404 of "Conservation of Oil and Gas, a Legal History," published in 1948 by the Section on Mineral Law of the American Bar Association, it is stated, in referring to Setcions 231 and 233 of Title 52, O.S. 1951, that:

> "Another 1913 act adopted the theory of ownership of gas in place and provided that a well in the common source of supply reduced the gas to possession."

In the *Cities Service and Phillips'* cases, *supra*, the Supreme Court of Oklahoma recognized this statute and gave full force and effect to its language providing for ownership of gas in place. This Court also recognized the validity, attached importance to and apparently considered conclusive the provisions of the statute. This appears from the following excerpt from its opinion (340 U.S. 179):

> "The Supreme Court of Oklahoma rejected these claims. It found that the Oklahoma statutes fully empowered the Commission to take the action which it took. The Oklahoma legislature, as early as 1913 declared that gas underlying land is the property of the landowner or his lessee; that gas may be taken from a common source of supply proportionately to the natural flow of the well and that the drilling of a well by an owner or lessee shall be regarded as reducing to possession his share of the gas, * * *."

Thus, as each well is drilled to production the gas owners reduce the gas to possession. If any fictitious legal incapability of ownership of gas which has not been reduced to possession be claimed, there certainly can be no such claim as to owning gas which has been reduced to possession. By drilling into the gas reservoir Phillips reduced to possession for Cabot one-fourth of seven-eighths of the gas along with its own share of said gas. Therefore, Cabot's ownership of the gas became complete at that time if not prior thereto.

Apart from the provisions of the Gas Act of 1913, Sections 231 and 232, Title 52, O.S. 1951, the Commission, as a part of and in furtherance of its broad regulatory powers (Laws 1915, Ch. 197, Sec. 4; Title 52, Sec. 239, O.S. 1951; *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 203 Okla. 35, 220 P.2d 279) has power and authority to consider gas as subject to ownership in place, which is what it did in its price fixing orders, and the Supreme Court of Oklahoma on the appeal from the Panoma order (No. 24745) recognized the validity of a sale of gas in the ground.

> "These contract provisions tend strongly to support commission's findings, and to indicate that in truth and in fact Natural bought and contracted to buy all of Panoma's Natural *gas in the ground* and to be produced from under this 78,000 acres, and that all provisions for drilling, producing, piping, compressing, processing, metering, etc. were merely details of delivery to Natural of that which it had already bought." *Natural Gas Pipe Line Company of America* v. *Panoma Corporation et al., supra.*

The Supreme Court of Oklahoma has, in many cases dealing with regulatory orders of the Commission, approved the abrogation or modification of many of the established rules based by analogy on common-law principles.

In *Gruger* v. *Phillips Petroleum Company,* 192 Okla. 259, 135 P.2d 485, it has expressly held that the Commission could, as an incident of regulation, modify or abrogate the law of capture. See also *Patterson* v. *Stanolind Oil and Gas Co. et al.,* 182 Okla. 155, 77 P.2d 83, affirmed 305 U.S.

376; *Palmer Oil Corporation, et al.* v. *Phillips Petroleum Company et al.*, 204 Okla. 543, 231 P.2d 997.

CONCLUSION

We respectfully submit that the writ should be denied.

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September, 1954.

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No. 274. PHILLIPS PETROLEUM CO. *v.* CABOT CARBON CO. On petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to that court for its reconsideration in the light of the latest order of the Corporation Commission of Oklahoma pertaining to the order in question. *Rayburn L. Foster, Harry D. Turner, R. M. Williams* and *Cecil C. Hamilton* for petitioner. *Robert M. Rainey* and *Streeter B. Flynn* for respondent. Reported below: 210 F. 2d 841.

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